Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

-v-

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule adopted by the New York courts, that they may adjudicate an Indian tribe's interests in its federally approved gaming compact in the tribe's absence because the tribe could waive sovereign immunity and appear as a party in the suit, is preempted by federal law because it conflicts both with federally protected sovereign immunity and with the federal interest in tribal economic development and self-sufficiency through regulated tribal gaming.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the New York Supreme Court were the Plaintiffs, Scott Peterman, Upstate Citizens for Equality, Inc., and the Honorable David Townsend, in his capacity as a member of the New York State legislature ("the UCE"), and the Defendants, George Pataki, Governor of the State of New York, and the New York Racing and Wagering Board and Division of State Police ("the State"). The Oneida Indian Nation of New York ("the Nation") entered a limited appearance in the New York Supreme Court. In the Appellate Division, Fourth Department, the Nation was the Appellant and both the UCE and the State were Appellees, because the State had joined with the UCE in opposing the Nation's Motion to Dismiss.

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STATEMENT OF JURISDICTION

On September 30, 2005, the New York Supreme Court Appellate Division, Fourth Department, issued an order affirming the New York Supreme Court's Judgment. The Court of Appeals of New York denied discretionary review on May 4, 2006. On July 24, 2006, Justice Ruth Bader Ginsburg granted an extension of time to file a petition for writ of certiorari, until October 2, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI.

Pertinent provision of the Indian Gaming Regulatory Act , 25 U.S.C. §§ 2701, *et seq.*, are set out in the Appendix, at A28-41.

STATEMENT OF THE CASE

In 1993, the Secretary of the Interior, through the Acting Assistant Secretary for Indian Affairs, approved a tribal-state gaming compact ("the Compact") between the Oneida Indian Nation of New York ("the Oneida Nation" or "the Nation") and the State of New York, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.* (2003). The notice of approval was published in the Federal Register on June 15, 1993, 58 Fed. Reg. 33160 (June 15, 1993), thereby placing the Compact "in effect" as a matter of federal law and authorizing the Nation to engage in the class III gaming specified in the Compact. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B).

Although plaintiffs in this case were aware of the governor's execution of the Compact and the submission of the Compact to the Secretary of the Interior, they did not challenge either.. Nor did they challenge the Secretary's approval of the Compact under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000), within the six-year statute of limitations applicable to the APA. The Oneida Nation invested hundreds of millions of dollars in gaming, hotel and other resort facilities, and thousands of employees came to work at the Nation's casino and resort complex. The Oneida Nation's gaming and resort complex is now the largest employer in an economically depressed region of Central New York.

In March 1999, a group known as the Upstate Citizens for Equality ("UCE") and individuals affiliated with UCE filed suit in New York state court seeking to invalidate the Oneida Nation's gaming compact, for the avowed purpose of helping the State to "renegotiate" the Compact to obtain a

share of casino revenues and to use that "renegotiation" as leverage against the Nation's pending land claim against the State.[1] Among other things, the UCE sought an injunction against all class III gaming activities. The UCE named State officials, the Oneida Nation, and Nation officials as defendants. The Nation moved to dismiss, asserting its federally protected sovereign immunity from suit. In response, the UCE filed an amended complaint, eliminating the Oneida Nation and Nation officials as defendants, but retaining its prayer for a declaration that the Compact was invalid under state law. The court allowed the case to proceed, rejecting the argument of both the Nation and the State that the Nation was an indispensable party and that federal protection of sovereign immunity required dismissal of the suit.

In 2003, the New York Court of Appeals decided *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047 (N.Y. 2003). The court held, as a matter of state constitutional law, that the governor needed the legislature's approval to negotiate and execute a gaming compact with an Indian tribe under IGRA. The court also rejected the State's argument that the case could not proceed in the absence of the tribal party to the challenged compact, the St. Regis Mohawk Tribe. The court reached this conclusion after balancing the factors set out in N.Y.C.P.L.R. § 1001, New York's indispensable party statute. In particular, the court found that there was a strong public interest in having the court resolve an important and previously undecided question of state constitutional law. The court also refused to give weight to the potential prejudice to the tribe:

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[1] Record at 646-48. The UCE also filed a motion to intervene in the Oneida land claims case pending in federal district court, including a proposed "countersuit" alleging that the Nation's gaming compact was invalid, *Oneida Indian Nation of New York v. County of Oneida*, 132 F.Supp. 2d 71, 72-73 (N.D.N.Y. 2000), but then withdrew its motion to intervene in favor of proceeding in state court. *Id.*

> The Tribe has chosen to be absent . . . . While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe . . . . [W]e will not permit the Tribe's voluntary absence to deprive these plaintiffs . . . of their day in court . . . . [T]o the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit.

Saratoga, 801 N.Y.2d at 820-21 (internal citations omitted).

After *Saratoga,* the UCE sought summary judgment against the state officials for a declaration that the Oneida Nation's Compact was invalid. With the permission of the court, the Oneida Nation entered a limited appearance for the purpose of asserting its federally protected sovereign immunity and seeking dismissal on indispensable party grounds.[2] The State reversed its earlier position and joined with the plaintiffs in requesting a declaration that the Nation's compact was invalid; the State refused the Nation's request that it oppose summary judgment on the grounds of the

[2] The court correctly ruled that the Nation could intervene for the limited purpose of moving to dismiss the suit for failure to join an indispensable party. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds,* 422 F.3d 490 (7th Cir. 2005) (sovereign may intervene for limited purpose such as moving to dismiss the lawsuit for failure to join an indispensable party without waiving its sovereign immunity); *see also Zych v. Wrecked Vessel Believed to be the Lady Elgin,* 960 F.2d 665, 667-68 (7th Cir. 1992) (state of Illinois did not waive sovereign immunity by intervening in order to move for dismissal of suit).

UCE's laches and lack of standing and opposed the Nation's motion to dismiss.[3]

The court granted the Nation leave to "renew" the motion to dismiss it had made prior to the UCE's Amended Complaint. (Pet. App. at A27). The Nation argued that "[t]he Nation's sovereign immunity simply bars a state court from adjudicating a matter that impacts a significant interest of the Nation." Mem. of Law Supporting the Renewed Mot. by the Oneida Indian Nation of New York to Dismiss Compl. at 4 (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991); and *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)).

The New York Supreme Court granted summary judgment, entering an order declaring the Compact invalid because it was entered into in violation of New York's separation of powers doctrine. (Pet. App. at A23-27). The court refused even to consider the significant record evidence of prejudice to the Nation if the case continued in its absence or the absence of any overriding public interest in addressing again the question of state constitutional law already decided in *Saratoga*. Instead, the court treated *Saratoga* as a *per se* rule allowing adjudication of an immune sovereign's rights in its absence, and held that "the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation . . . . [T]o the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have chosen to mitigate its damages by participating in the litigation as a party." (Pet. App. at A15).

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[3] There could be no argument, therefore, that the state represented the Nation's interests. After the state's change of position, the Nation moved to dismiss on the additional ground of lack of a case or controversy. The court denied that motion.

On appeal, the Nation again urged that reversal was compelled by the federal protection of the Nation's sovereign immunity. Br. of Appellant Oneida Indian Nation of New York at 25, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("Federal law requires reversal of the court's indispensable party ruling, because it punishes the tribe for asserting its federally protected sovereign immunity"); Reply Br. of Appellant Oneida Indian Nation of New York at 2-3, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("The Nation consistently has asserted that its sovereign immunity means *both* that it cannot be sued as a defendant and that its interests cannot be adjudicated in its absence, because forcing the Nation to waive its immunity in order to protect its interests renders its federally guaranteed immunity meaningless") (emphasis in original). The Appellate Division affirmed the judgment for the reasons stated by Supreme Court. 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005). (Pet. App. at A3-5) The Nation sought review in the New York Court of Appeals, again urging that federal law required reversal. Oneida Indian Nation of New York's Mem. of Law in Support of its Mot. for Permission to Appeal at 10-11, *Peterman v. Pataki* (Mo. No. 186) ("As a matter of federal law, an Indian tribe's immunity bars litigation, to which the tribe is not a party, challenging a compact to which the tribe is a party."). The Court of Appeals denied discretionary review. 6 N.Y.3d 713, 849 N.E.2d 971 (N.Y. 2006) (Pet. App. at A1-2) The Court of Appeals has, therefore, approved the lower courts' understanding of the ruling in *Saratoga:* sovereign immunity does not bar a suit contesting the validity of an immune tribe's compact, even if it bars suit against the tribe itself, so long as the tribe retains the right to waive its immunity and intervene in the litigation.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The New York courts have ruled that they may ignore the Nation's federally protected sovereign immunity and decide issues that could profoundly impair the Oneida Nation's interests in a federally approved gaming compact, in litigation to which the Nation is not a party, because the Nation could be a party if it were willing to waive its federally protected sovereign immunity. The rule that has been applied in this case and in other recent New York decisions is broader and even more troubling than the decision in *Saratoga,* which relied in large part on the New York Court of Appeals' perceived need to address a then unsettled issue of New York constitutional law. The decision in this case has forged language from *Saratoga* into an absolute rule that an Indian tribe may never be indispensable to a suit in which it could waive sovereign immunity and be a party if it chose to do so. The application of that rule is particularly troubling here, where the UCE sought no relief as to the nominal state defendants, and both sides ultimately joined in a request for a declaratory judgment, the sole purpose of which was to impair the Oneida Nation's federal gaming compact.

The New York courts' decision is in blatant disregard of federal interests and conflicts directly with this Court's precedents. There are two strong federal interests at stake in this litigation – the federal protection of tribal sovereignty, repeatedly affirmed by this Court, *Kiowa Tribe of Oklahoma v. Mfg Techs., Inc.,* 523 U.S. 751, 756 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991), and the federal interest in tribal economic development and self-sufficiency, recognized by this Court in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216-19 (1987), and codified in IGRA. 25 U.S.C. § 2702(1) (IGRA serves Congress' purpose of

"promoting tribal economic development, self-sufficiency, and strong tribal governments"); S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075 (affirming "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands"). Forcing a tribe to surrender one in order to protect the other is incompatible with federal protection of both and therefore is preempted by federal law. *Three Affiliated Tribes,* 476 U.S. at 889-90 (tribe cannot be forced to waive sovereign immunity in order to have access to state courts for suits against non-Indians, as intended by Congress); *Cabazon,* 480 U.S. at 216 ("[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law").

The intrusion on tribal immunity in this case is not technical or peripheral. At stake are substantial economic and employment interests of Indian tribes and surrounding communities, as protected by an intergovernmental compact, made under federal law between state and tribal governments and approved and put into effect by the federal government. No one suggests that such state court challenge could be brought directly against the tribe or the Secretary of the Interior. It is worse, not better, for the state courts of one of the parties to the compact to proceed with the exact same litigation in the absence of the tribe or the federal government. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (a state cannot be its own ultimate judge in a controversy with another sovereign over the validity of an interstate compact to which that state is a party). This Court should grant review to make clear that states may not coerce a waiver of federally protected sovereign immunity or litigate important federal and tribal interests in the absence of both the tribe and the federal government.

I. Federally Protected Sovereign Immunity Includes The Tribe's Right Not To Have Its Interests Adjudicated Without Its Consent

Federal law recognizes and protects tribal sovereignty. *Cabazon*, 480 U.S. at 207; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756.

Congress alone can authorize a suit against an Indian tribe, and it must do so explicitly. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (Indian Civil Rights Act does not waive tribe's immunity from suit in federal court). This Court has twice struck down a compulsory counterclaim rule that, in the absence of Congressional consent, conflicted with tribal immunity. *See Potawatomi*, 498 U.S. at 509, 514 (federal compulsory counterclaim rule could not be applied to allow counterclaim against tribe that sued for injunctive relief; Congress has not authorized counterclaim against tribe); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940) (same).

Tribal immunity is given force even if its application means that certain issues involving Indian tribes cannot be resolved in the courts. *U.S. F & G*, 309 U.S. at 513 ("[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (tribe indispensable to suit challenging gaming compact; plaintiffs' lack of another adequate remedy "is a common consequence of sovereign immunity, and the tribes'

interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims").[4]

Sovereign immunity includes the tribe's "sovereign right not to have its legal duties judicially determined without consent." *Enterprise Mgmt. Consultants,* 883 F.2d at 894. Allowing plaintiffs to challenge a contract to which a tribe is a party "would . . . effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Id.* Thus, federal courts consistently hold that where a necessary party is immune from suit, dismissal is required under the federal indispensable party rule, Fed. R. Civ. P. 19(b).

> [W]hen an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves . . . . The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one where some procedural defect such as venue precludes

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[4] In fact, IGRA provides other fora for plaintiffs to challenge a gaming compact, including APA review of the Secretary's decision. *See* 25 U.S.C. § 2714 (decisions made by NIGC pursuant to § 2710 are final agency decisions for purposes of APA review); *Kansas v. United States,* 249 F.3d 1213, 1225-26 (10th Cir. 2001) (tribe not indispensable to suit seeking APA review of NIGC decision; federal government adequately represented tribe's interests). The fact that the Nation's sovereign immunity bars these plaintiffs from obtaining review of the compact in state court is completely consistent with the comprehensive federal scheme set out in IGRA. Class III gaming is legal pursuant to a compact that has been approved by the Secretary of the Interior and published in the Federal Register. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B). Whether a compact is in effect is purely a question of federal law. *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1055-56 (9th Cir. 1997). IGRA assigns all ultimate decision-making to federal authorities, both in approving the gaming and in enforcing gaming laws and regulations. *See* 25 U.S.C. §§ 2715, 2710, 2713; 18 U.S.C. § 1166 (2006). There is no private right of action under IGRA. *Florida v. Seminole Tribe,* 181 F.3d 1237 (11th Cir. 1999).

> litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Fluent, 928 F.2d at 548 (internal citations and punctuation omitted); *see also Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (absent tribes indispensable to suit challenging settlement act of which they were beneficiaries; "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent") (internal quotation and citation omitted).

The fact that the tribe could waive its immunity and intervene in the suit does not alter the analysis. "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986); *see also United Keetoowah Band of Cherokee Indians of Oklahoma v. United States*, 67 Fed. Cl. 695, 703 (2005) (same); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (same). More simply, immunity is lost altogether when it is ignored on the ground that it could be, but was not, waived.

II. Federal Law Preempts New York's Application Of Its Indispensable Party Rule.

Federal law preempts state procedural rules that are incompatible with federal and tribal interests in tribal autonomy and economic self-sufficiency. In *Three Affiliated Tribes*, this Court held that a North Dakota statute that refused to allow state courts to exercise their federally-granted jurisdiction over civil claims on an Indian reservation unless the tribe waived sovereign immunity was preempted by federal law. The fact that the tribe could have the access to state courts that Congress intended by waiving its

sovereign immunity did not remedy the problem because that condition was inconsistent with another clear federal interest: "Congress' jealous regard for Indian self-governance." 476 U.S. at 890.

State litigation over the validity of a federally approved tribal state gaming compact has the potential to impair federal interests in tribal self-sufficiency and economic development, recognized by this Court in *Cabazon* and protected by Congress in IGRA. Although the validity of a federally approved gaming compact is a federal question that cannot be decided by a state court, *supra* n.4, a state court decision that the compact is "invalid" as a matter of state law has been and will be used by gaming opponents in an effort to affect that federal determination. (Pet. App. at A42-43) (Letter from UCE to NIGC urging that Nation's casino be closed in light of *Saratoga*); *see also Am. Greyhound,* 305 F.3d at 1024 (tribes not bound by ruling on validity of compact, but tribes' interests may be affected as a practical matter).

Federal courts uniformly hold that litigation over the validity or terms of a gaming compact, or any other tribal-state compact, cannot go forward in the absence of either of the parties to the compact, the tribe or the state. *Wilbur v. Locke,* 423 F.3d 1101, 1113 (9th Cir. 2005) (tribe indispensable to suit challenging cigarette compact between tribe and state; "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable") (citation omitted); *Am. Greyhound,* 305 F.3d at 1027 (tribe indispensable to suit to enjoin governor from entering into, modifying or renewing gaming compacts with tribes); *Kickapoo Tribe of Indians v. Babbitt,* 43 F.3d 1491, 1498-99 (D.C. Cir. 1995) (state indispensable to suit asserting that compact was valid under federal law because it had been submitted to Secretary of Interior for approval); *Cachil Dehe*

Band of Wintun Indians of the Colusa Indian Community v. California, No. S-04-2265 FCD KJM, 2006 WL 1328267, at *6 (E.D. Cal. May 16, 2006) (suit dismissed because plaintiffs seek interpretation of gaming compact that would impact other, immune tribes); *Dewberry v. Kulongoski,* 406 F.Supp. 2d 1136, 1150 (D. Or. 2005) (tribe indispensable to suit challenging gaming compact); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds,* 422 F.3d 490 (7th Cir. 2005) (same); *Pueblo of Sandia v. Babbitt,* 47 F.Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to suit challenging Secretary of Interior's refusal to exercise authority to disapprove provisions of compact as contrary to IGRA); *Cf. Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 552-53 (4th Cir. 2006) (tribe indispensable to suit challenging tribal preference policy included in management agreement between tribe and defendant management company; judgment would impair the tribe's contractual interests).

The decision in this case is in direct conflict with the unanimous view of the federal courts that a tribe cannot be forced to waive its sovereign immunity in order to protect its interests in a federally approved gaming compact. Here, as in *Three Affiliated Tribes,* important federal and tribal interests, in regulating Indian gaming in a way that preserves the "sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands," S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075, are prejudiced by allowing state court litigation challenging the validity of the Nation's federally approved gaming compact to proceed in the absence of both the tribe and the federal government. And here, as in *Three Affiliated Tribes,* it is incompatible with federal law for the state to require the Nation to waive its sovereign immunity in order to protect those interests.

III. Review Is Needed Because The New York Decision Conflicts With Decisions Of This Court And With A Uniform Body Of Law In The Federal Courts And Because There Is Confusion Among The State Courts Over The Issue Presented Here.

Review of this decision is needed because, in allowing the decision of the Fourth Department to stand, the New York Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *Three Affiliated Tribes*, with this Court's scrupulous protection of tribal sovereign immunity, and with the unanimous view of the lower federal courts that the federal policies at stake bar a court from litigating the validity of a tribal state gaming compact in a proceeding to which the tribe cannot be made a party because of its sovereign immunity.

Review is needed because state courts are divided on whether forcing a tribe to abandon its sovereign immunity in order to protect its interests in a gaming compact is acceptable. The Wisconsin Supreme Court has ruled on the validity of a gaming compact in the absence of the tribe after the court of appeals ruled that the tribe was not indispensable. *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, 719 N.W.2d 408 (2006). New Mexico, in contrast, has followed the analysis of the federal courts, finding that a tribe is indispensable to a suit challenging a gaming compact. *State ex rel. Coll v. Johnson*, 128 N.M. 154, 990 P. 2d 1277 (N.M. 1999).[5]

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[5] *Coll* distinguished an earlier New Mexico case, *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995), in which the court had allowed a mandamus action to prohibit the governor from implementing compacts he had signed as resting on the "special character of mandamus." 128 N.M. at 158 (quoting *Srader v. Verant*, 125 N.M. 521, 964 P.2d 82, 92 (N.M. 1988)). Similarly, *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), to which the tribe was not a party, was a mandamus/quo warranto action, brought for the purpose of preventing the governor from submitting the compact to the Secretary of the Interior for approval.

Finally, review is needed because the issue presented in this case is of tremendous significance even beyond the gaming context. Like the New York court in this case, other New York courts have interpreted the language in *Saratoga* as a *per se* rule to be applied in every case – an Indian tribe cannot be indispensable as long as it could waive its sovereign immunity and appear as a party in the case. *See, e.g., Concern, Inc. v. Pataki*, 801 N.Y.S.2d 232 (Sup. Ct., Erie Cty. 2005), *appeal dismissed,* 816 N.Y.S.2d 397 (N.Y.App. Div., 4th Dep't 2006) (tribe not necessary to suit seeking to restrain the state from acquiring and transferring land to the Seneca Nation for the establishment of a casino; "[t]he Tribe has chosen to be absent") (citing *Saratoga)*; *Huron Group, Inc. v. Pataki,* 785 N.Y.S.2d 827, 841 (N.Y. Sup. Ct., Erie Cty. 2004), *aff'd,* 803 N.Y.S.2d 465 (App.Div., 4th Dep't 2005), *appeal dismissed,* 2005 NY LEXIS 220 (N.Y. Feb. 21, 2006) (same); *In the Matter of the Herald Co., v. Feurstein,* 779 N.Y.S.2d 333, 345 (Sup. Ct., N.Y. Cty. 2004) (Nation not indispensable to suit seeking state records of any complaints with regard to Nation's casino; "to the extent that the Oneidas are prejudiced by this Court's adjudication of issues that affect its rights under the compact, the Oneidas could have mitigated that prejudice by participating in the suit") (citing *Saratoga).*[6] At least one other state court, citing *Saratoga,* has applied the same rule –

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[6] These cases demonstrate that the waiver rule New York has adopted cannot be justified under the Ninth Circuit's "public rights" exception to compulsory joinder rules. *Conner v. Burford,* 848 F.2d 1441, 1459-61 (9th Cir. 1988). Even if that rule were applicable in a case where the absent party asserts sovereign immunity, it is a narrow exception applicable only where the litigation transcends the private interests of the litigants, and does not destroy the legal entitlements of the absent parties. *Am. Greyhound,* 305 F.3d at 1025-26; *Dewberry,* 406 F.Supp. 2d at 1148-49. In this case, the litigation was not necessary to resolve any unsettled legal issue. In fact, there was not even a dispute between the only parties to the case, the plaintiffs and the state. The purpose of the litigation was solely to obtain a legal declaration that the plaintiffs could use in their efforts to shut down the Nation's casino. The other cases in which the *Saratoga* rule has been applied are similarly private disputes.

an Indian tribe is not indispensable as long as it can waive its immunity and enter the litigation. *Panzer v. Doyle*, 271 Wis.2d 295, 329, 680 N.W.2d 666, 683 (Wis. 2004), *overruled on other grounds in Dairyland*, 2006 WI 107, 719 N.W. 2d 408 (Wis. 2006).

The same reasoning applied by the New York courts in cases involving the rights of Indian tribes could be applied to any sovereign: the sovereign could mitigate its prejudice by waiving its immunity and entering the suit. The rule that has been adopted by the New York courts therefore means one of two things, both of which are inconsistent with federal interests. The rule may mean that courts in New York (and other states following New York's lead) have assumed the authority to coerce a waiver of sovereign immunity by any sovereign, including another state or the federal government, by threatening to litigate the rights of the sovereign party in the sovereign's absence. If so, review by this Court is needed to make clear that a state cannot, by utilizing a state rule of procedure, abrogate federally protected sovereign immunity. The other alternative is that New York has adopted a rule that applies only to the detriment of Indian tribes but not to other sovereigns. Such a rule clearly requires this Court's intervention, as it flatly contradicts this court's "jealous regard for Indian self-government." *Three Affiliated Tribes*, 476 U.S. at 890.

The record in this case presents the federal question clearly. The Nation has challenged the state court proceedings at every stage, on precisely the federal ground presented in this petition. The New York courts have ignored the federal question and the federal interests at stake. The decision of the New York Supreme Court, which was adopted by the Fourth Department and allowed to stand by the Court of Appeals, is a clear statement of New York's rule: unless Indian tribes waive their sovereign immunity, their rights in gaming compacts and other matters of federal interest will be litigated in their absence. There are no obstacles to the

Court's review of this case to make clear that New York and other states may not hold federally protected interests hostage to a waiver of federally protected sovereign immunity.

CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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APPENDIX

State of New York,
Court of Appeals

At a session of Court, held at Court of Appeals Hall in the City of Albany on the .....fourth.....day of .....May.....2006

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

4-10 Mo. No. 186
Scott Peterman, et al.,
Respondents,

v.
George Pataki, Governor of State Of New York, et al.,
Respondents.
Oneida Indian Nation of New York,
Nonparty-Appellant,
et al.,
Nonparty.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the non-party-appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

_____

Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1112

CA 04-02580

PRESENT: PIGOTT, JR., P.J., GREEN, GORSKI, SMITH, AND LAWTON, JJ.

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, PLANTIFFS-RESPONDENTS,

ORDER

V

GEORGE PATAKI, GOVERNOR OF STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD AND DIVISION OF STATE POLICE, DEFENDANTS-RESPONDENTS,

---

ONEIDA INDIAN NATION OF NEW YORK AND RAY HALBRITTER, APPELLANTS.
(APPEAL NO.1.)

ZUCKERMAN SPAEDER, LLP, WASHINGTON, D.C. (ELIZABETH TAYLOR, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR APPELLANTS.

O'CONNELL AND ARONOWITZ, ALBANY (CORNELIUS D. MURRAY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (James W. McCarthy, A.J.), entered August 25, 2004. The judgment, insofar as appealed

from, denied the motion of Oneida Indian Nation of New York and Ray Halbritter to dismiss the third amended complaint upon the grounds of failure to join an indispensable party and lack of a justiciable controversy.

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed without costs for reasons stated in decision at Supreme Court.

Entered: September 30, 2005

JOANN M. WAHL
Clerk of the Court

SUPREME COURT)
APPELLATE DIVISON,)
Fourth Judicial Department,)
Clerk's Office, Rochester, N.Y.)

I JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have thereunto set my hand and affixed the seal of said Court in the City of Rochester, New York, this

.....
Clerk

SUPREME COURT CHAMBERS
Oswego, New York

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Re: *Peterman v. Pataki*
RJI No. 32-99-0520

LETTER DECISION

The above-referenced matter is before this court pursuant to [1] Plaintiff's motion for summary judgment [New York Civil Practice Law and Rules § 3212, and [2] the Oneida Indian Nation of New York's [herein after Nation] cross motion for leave to renew [New York Civil Practice Law and Rules § 2221[e]]. Oral argument was heard by the court on April

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22, 2004, after which, on May 6, 2004, counsel for the Nation "supplemented" its initial motion. Final submissions were received on May 22, 2004, after which decision was reserved. Having reviewed the submissions of the parties and the Nation, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

As more fully set forth in this court's previous Letter Decisions, the instant action finds it genesis in the 1993 Compact entered into between the Nation and the defendant, State of New York. Plaintiffs challenge the authority of then Governor Mario Cuomo to execute a compact with the defendant, Oneida Indian Nation of New York to operate gambling casinos within the State of New York under the Indian Gaming Regulatory Act of 1988 [25 U.S.C. § 2701, *et seq.*]. In essence, the plaintiffs argue that then Governor Cuomo lacked the authority to enter into the compact without legislative approval, and that the compact contravenes public policy against class III gaming activity.

Following a conditional dismissal of the instant action by Justice Murad, this court, by Letter Decision dated October 24, 2001, granted plaintiffs' motion for leave to file second amended complaint, and denied the plaintiffs' motion for summary judgment as premature.[7] On December 20, 2001

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[7] In granting plaintiffs' motion for leave to file second amended complaint, this court found that the plaintiffs had plead facts sufficient to demonstrate taxpayer standing with respect to Scott Peterman and David Townsend, organizational standing with respect to Upstate Citizens for Equality and found that the Oneida Indian Nation of New York was not a necessary and indispensable party. This

this court signed an Order consistent with its letter decision. The Order was filed and entered in the Oneida County Clerk's office on January 24, 2002. On the same date, plaintiffs filed their second amended complaint. Following entry of the order and service of the second amended complaint, the Oneida Indian Nation of New York moved for leave to renew and reargue this court's January 24, 2002 order, the State of New York moved to dismiss plaintiffs' second amended complaint and plaintiffs, Scott Peterman, Upstate cross moved for summary judgment.

By Letter Decision dated May 23, 2002, the court granted the Nation's motion for leave to renew/and or reargue, and based upon a review of the record before it, adhered to its original decision, denied the State of New York's motion to dismiss and denied plaintiffs' cross motion for summary judgment as premature[8]. Following entry of this Courts' August 14, 2002 Order, the State of New York appealed this court's decision to the Appellate Division, Fourth Department. In December of 2003, the State of New York withdrew its appeal, and the instant motion and cross motions were brought.

Court further found that the plaintiff, the Hon. David Townsend did not have standing to proceed as a legislator.

[8] In that Letter Decision, this court found, based primarily upon the Appellate Division, Third Department's Decision Saratoga Chamber of Commerce v. Pataki, 293 A.D.2d 20 (3rd Dept. 2002), aff'd as modified, 100 N.Y.2d 801, cert. denied, 124 S.Ct. 570, the Oneida Indian Nation of New York was not a necessary and indispensable party to the action, that the plaintiffs had standing, that the action was not pre-empted, and that the instant action was not barred by the applicable Statute of Limitations and laches.

By Notice of Motion dated February 9, 2004, plaintiffs moved for summary judgment arguing that:

> The high court [New York Court of Appeals] has rendered a decision on the validity of a 1993 compact entered into between the Mohawk Tribe and New York State, finding that the purported transaction violated the separation of powers doctrine. As relevant here, it found that the compact was illegal, by virtue of its lack of legislative authorization. The governor cannot bind the state to such a compact, and notwithstanding the various positions claiming constructive ratification, the [Court of Appeals] handed down a decision substantially consistent with the reasoning of most high courts in other states that have addressed the question.

[Plaintiffs' Counsel's Affirmation in support of Summary Judgment at ¶ 20]. In sum and substance, plaintiffs argue with respect to their first cause of action that, under the doctrine of stare decisis, this court is bound to follow the New York Court of Appeal's Decision in Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003), and to find the compact invalid[2].

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Plaintiffs additionally moved for summary judgment on their second and third causes of action, in which they allege that the Compact violates Article 1, Section 9 of the New York

Defendants, in opposition to the instant motion for summary judgment, in essence concede the applicability of the decision in Saratoga Chamber of Commerce, supra, with respect to the plaintiffs' first cause of action. This concession, however, is not the end of the court's analysis.

On April 19, 2004, three days before the scheduled return date, the Nation entered: "...special appearance for the limited purpose of contesting the jurisdiction of the court, and specifically to renew the nation's motion to dismiss the Complaint on the grounds of Tribal sovereign immunity." [April 18, 2004 Notice of Special Appearance]. The Nation's motion for leave to renew is predicated on two arguments:

> First, the ruling of the Court of Appeals in *Saratoga Chamber of Commerce v.Pataki*, 100 N.Y.2d 801, *cert. denied*, ___U.S.___, 124 S.Ct. 570 (2003), establishes that this litigation affects significant interests of the nation. Consequently, this Court's decision to the contrary must be reconsidered. Second, the ruling in Saratoga has altered the interests this court considered in ruling that the litigation could proceed in the tribe's absence. There is now no compelling interest in addressing a significant issue of

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State Constitution. Based upon representations made by the Assistant Attorney General at oral argument, plaintiffs withdrew their motion with respect to the constitutionality of the Compact.

> state law. The potential prejudice to the nation, however, is even greater than it was prior to the ruling in *Saratoga*, because it is now clear that the State cannot and will not adequately protect the Nation's interest. The State's refusal to present a meritorious laches defense on behalf of the Nation is illustrative of this conflict.

[Nation's Memorandum of Law at p.2].

Following oral argument on April 22, 2004, counsel for the Oneida Nation submitted a Supplemental Affirmation, raising for the first time an argument that the instant action should be dismissed insofar as there no longer exists a justiciable controversy. The affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy the court is required to dismiss the instant action. In opposition to the supplemental affirmation, the State defendants argue:

> ...The Oneidas now urge that the state and the plaintiffs entered into an agreement regarding the separation of powers issue resolved in the Saratoga County Chamber of Commerce case, which effectively prejudiced the interests of the Oneidas. There was never any 'agreement' made between the State and the plaintiffs.

> As the record demonstrates, the State conceded that under the principal of stare decisis [so in original], this court was bound to follow the Court of Appeal's determination in Saratoga on the separation of powers question pertaining to the Governor's authority to enter into the 1992 Compact with the Oneidas without legislative authority [citation omitted]. The State also concedes that the application of the Saragota decision to the instant matter would result in a declaration that the Governor violated State separation of powers law when he entered into the compact with the Oneidas in 1993, and consistent with the ruling in Saratoga, the Compact was void and unenforceable under State law.

[May 17, 2004 Letter from Assistant Attorney General Robert A. Siegfried].

In light of the foregoing, this court turns its attention to the substantive issues before it.

Conclusions of Law:

A. Motion for Leave to Renew, Oneida Indian Nation of New York's [New York Civil Practice Law and Rules § 2221[e]:

As set forth in the Nation's counsel's affirmation in support of its motion for leave to renew, the Nation's argument is limited to "...the grounds of tribal sovereign immunity and the indispensability of the Nation as a party to the case." [Affirmation of Peter D. Carmen in Support of the Nation's Motion for Leave to Renew at ¶ 2]. As more fully set forth above, the Nation's position is predicated upon an argument that the Court of Appeal's decision in Saratoga County Chamber of Commerce, *supra*, establishes that a significant interest of the Nation will be effected, and second that the State, as a result of the decision, will no longer act to protect the interests of the Nation in this action.

New York Civil Practice Law and Rules § 2221[e] provides:
(e) A Motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

N.Y.Civ. Prac. L.& R. § 2221[e] (McKinney 1993) [emphasis added]. Upon review of the papers submitted by the Nation, this Court grants leave to renew.

Turning to the merits, in its two previous Letter Decisions and resultant Orders, this court held that the Nation is not an indispensable party, as defined by the New York Civil Practice Law and Rules § 1101. In reviewing the decision of the Court of Appeals in Saratoga County Chamber of Commerce, *supra*, this court does not find, as the Nation argues, that the decision announced a change in the law sufficient to change the court's prior determination. In holding that the Mohawk tribe was not an indispensable party

in the Saratoga case, the Court of Appeals engaged in a painstaking analysis of CPLR § 1101, and concluded that:

> The Tribe has chosen to be absent. Nobody has denied it the 'opportunity to be heard'; **in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate.** While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe (see Keene v. Chambers, 271 N.Y. 326, 330 [1936]; Plaut v. HGH Partnership, 59 A.D.2d 686 [1st Dept. 1977]; 3 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 1001.10 [citing cases]). **While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court. In balancing the CPLR 1001 factors, the Appellate Division concluded that the equities weighed against dismissal.** That conclusion was not an abuse of discretion. While in other cases sovereign immunity might support dismissal, [footnote omitted] here the factors weigh toward allowing judicial review of this constitutional

> question (see generally Siegel, N.Y. Prac. § 133 ['Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort']). [footnote omitted].
>
> We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. **We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit** (cf. United States ex rel. Steel v. Turn Key Gaming, Inc., 135 F.3d 1249, 1252 [8th Cir.1998]). The Tribe's nonjoinder is therefore excused...

Saratoga County Chamber of Commerce, *supra* at 820-821[emphasis added]. The same can be said in the instant action. While the Nation goes to great lengths on the instant motion for leave to renew to show the potential economic harm it will suffer if the court invalidates the 1993 Compact, the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation, To paraphrase the Court of Appeal's decision in Saratoga, to the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have chosen to mitigate its damages by participating in the litigation as party. [see, In the Matter of the Herald Company, Inc. v. Robert Feurstein, *et al*, —Misc.3d—, 2004 W.L. 503440 (S. Ct. N.Y. Co. 2004).[10]

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Nor is the court persuaded by the Nation's argument that the instant action should be dismissed as barred by laches. In support of its position, the Nation argues: "*In Saratoga,* the Court of Appeals affirmed the lower court's refusal to dismiss the Complaint on the ground of laches, because the record was insufficient to support dismissal on that grounds. The record in

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> Respondents also argue that the petition must be dismissed because the Oneidas are a necessary party who cannot be forced to appear in this matter as they are not subject to judicial process. Clearly the Oneidas are not a party to this action. Although their interests are certainly affected by this litigation, the Oneidas have chosen not to participate. Unless Congress provides otherwise, Indian tribes, including the Oneidas, possess sovereign immunity against the judicial processes of states (see Saratoga County Chamber of Commerce Inc. v. Pataki, 100 N.Y.2d 801, 818, 766 N.Y.S.2d 654, 798 N.E.2d 1047, cert. denied ---U.S. ----, 124 S. Ct. 570, 157 L.Ed.2d430 [2003]; see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L.Ed 106 [1978]; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed 894 [1940]). **As a result, New York courts cannot force the Oneidas to participate in this matter. However, contrary to respondents' claim, the Oneidas' absence does not require this Court to dismiss this action.**

In the Matter of the Herald Company, Inc. v. Robert Feurstein, *et al*, supra at 2004 W.L.503440,*8.

this case will demonstrate a very different picture." [Nation's Memorandum of Law at p. 11]. While counsel for the Nation is technically correct in his assertion, a more thorough analysis of the opinion is necessary.

In deciding the issue of laches, the Court of Appeals did not limit its decision to the paucity of the record concerning economic harm to the Mohawks, finding:

> Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's Counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts. [footnote omitted]. Thus, while the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts could ever proceed.

Saratoga County Chamber of Commerce, supra at 817-818. In reaching this conclusion, the Court of Appeals makes reference to the June 15, 1993 Memorandum from Elizabeth Moore, Esq., counsel to then Governor Mario Cuomo, in which she "...amplifies our reasons for seeking enactment of legislation to authorize the state to carry out . . . [its] duties pursuant to the

Indian Gaming Regulatory Act..."[Memorandum of Elizabeth Moore to then Governor Mario Cuomo, attached to Nation's Counsel's Affirmation in Support of Motion to Renew, Exhibit F]. The memorandum goes on to make specific reference to the Compact which is at issue in the instant action. While counsel for the Nation attempts to limit the effect of the Memorandum in the instant action, it is clear that, just as with the Mohawks in the Saratoga case, the Nation was on notice of the potential vulnerability of the Compact, and thus this court finds: "... the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches."

B. Justiciable Controversy:

Following oral argument on April 22, 2004, counsel for the Nation submitted a: "Supplemental Affirmation Supporting Motion by the Oneida Indian Nation of New York to Dismiss Complaint for Lack of Justiciable Controversy." As more fully set forth above, the affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy, the court is required to dismiss the instant action. As set forth above, and in this court's two previous Letter Decisions, the Nation is neither a party to the instant action, nor is it an indispensable party, thus the first question before this court is whether it has standing to raise the issue of justiciable controversy.

Citing to decisions in which courts have declined to issue judgment declaring the rights of parties, where the rights of a third party would be adversely affected, as well as cases in which courts have declined to issue such judgments where there is no longer a "genuine or justiciable controversy" before it, the Nation argues that the court has been divested of its authority to declare the rights of the parties. The cases cited by the Nation in support of its argument involve fact patterns in which the third parties had

an interest in the outcome of the litigation, which is the case here, but who were
excluded from the litigation. There are no cases cited by the Nation in which a party, that has voluntarily absented itself from the litigation, was later allowed to object to the court rendering a decision.[11]

Even if the Court were to accept the Nation's argument that is has standing in its limited appearance to raise the issue of justiciable controversy, turning to the merits of their argument, this court finds it to be without merit. In the instant case, the court does not find that the actions of the plaintiffs and defendants create a feigned controversy necessitating dismissal. Here there is no agreement either express or implied to submit the action to the court solely to obtain a predetermined declaration of the rights of the parties.

At oral argument in the instant action, counsel for the State of New York conceded that the court, under the doctrine of *stare decisis* was bound to follow the decision of the New York Court of Appeals in Saratoga County Chamber of Commerce v. Pataki, *supra*, insofar as the instant action is indistinguishable from the decision. This court does not find that, under the circumstances of this case, that a concession by counsel in opposing a motion for summary judgment of existing, controlling precedent, divests this court of jurisdiction to declare the rights of the parties before

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[11] Again the Nation argues that is would be substantially prejudiced by the decision of this court. However as the Court of Appeals held when determining that the Mohawks were not an indispensable party: "We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suits." Saratoga Chamber of Commerce v. Pataki, *op.cit.*

it. Where the Nation's argument taken to its logical conclusion, any time that a party cited controlling precedent in support of its position and opposing party conceded the applicability of the precedent to the matter before the court, the court would be precluded from declaring the rights of the parties based upon controlling case law, a position that strikes at the very heart of the doctrine of *stare decisis.*[12] Accordingly, the Nation's Motion to

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[12] '...The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided (emphasis added) in conformity with the earlier decision' (People v. Bing, 76 N.Y.2d 331,337-338). The doctrine, which 'rests upon considerations of practicality and principle' (People v. Damiano, 87 N.Y.2d 477, 48 [Simons J., concurring]), recognizes that a legal question, once resolved, should not be reexamined each and every time that it is presented see, Matter of Deposit Cent. School Dist. v. Public Empl. Relations Bd.,214 A.D.2d 288, 290, lv. dismissed, lv. denied 88 N.Y.2d 866; Dufel v. Green, 198 A.D.2d 640, affd. 84 N.Y.2d 795). Simply stated, the established precedent prevails unless there is a compelling reason to depart from it (see, Matter of Schulz v. State of New York, 241 A.D.2d 806,808, appeal dismissed 90 N.Y.2d 1007; Dufel v. Green, supra).

Battle v. State, 257 A.D.2d 745, 746 (3rd dept. 1999), lv.to.app.denied, 93 N.Y.2d 805 (emphasis added); *see also*, 28 N.Y.Jur.2d Courts and Judges §220; 1 Carmody-Wait 2d § 2:261, courts and Their Jurisdiction, Generally; Statement and Purpose of Doctrine [*Stare Decisis*].

Dismiss the Complaint based on a Lack of justiciable Controversy is, in all respects denied.[13]

C. Summary Judgment:

Turning to the merits of the case before it, as framed by counsel for the parties to the instant action, the sole remaining issue to be determined by this court on plaintiffs' motion for summary judgment is whether then Governor Mario Cuomo exceeded his authority in entering into the 1993 Compact with the Oneida nation without legislative approval.

Reviewing the case before it in light of the Court of Appeals Decision in Saratoga County Chamber of Commerce v. Pataki, *supra*, this court finds the unilateral actions of then Governor Cuomo in entering into the Compact without legislative approval clearly violated the doctrine of separation of powers recognized by Articles 3-5 of the Constitution of the State of New York (see N.Y. const., art. III, § 1; art. IV, § 1; art. VI, § 1)[14], and thus declares the 1993 Compact invalid.

As Judge Celya, writing for the First Circuit Court of Appeals observed in The Dartmouth Review v. Dartmouth College, *et al*,889 F.2d 13 (1st cir. 1989): "We find this to be a ketchup bottle type argument: it looks quite full, but it is remarkably difficult to get anything useful out of it." Id. at 18.

[14] "Stated succinctly, the separation of powers 'requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies' (Bourquin v. Cuomo, 85 N.Y.2d 781, 784, [1995] [citing Matter of New York State Health Facilities Assn v. Axelrod, 77 N.Y.2d 340, 349 (1991)])." Saratoga County Chamber of Commerce v. Pataki, *supra at 821-822.*

The foregoing constitutes the Letter Decision of the Court. Counsel for the plaintiffs is to submit an Order consistent herewith the signature within five days of receipt.

ENTER,

_____

Hon. James W. McCarthy
Acting Supreme Court Justice

Dated: June 25, 2004
at Oswego, New York

JWN/knc
cc: Court File

At a motion Term of the Supreme Court of the State of New York, held in and for the county of Oneida, at the Oswego County Courthouse, Oswego, New York on the 22nd day of April, 2004.

PRESENT: Hon. James McCarthy
Acting Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SMILARLY SITUATED,

Plaintiffs,

ORDER

-vs-

Index No.: 99-533
RJI No.: 32-99-0520

GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD, DIVISION OF STATE POLICE, RAY HALBRITTER AND ONEIDA INDIAN NATION OF NEW YORK,

Defendants.

Plaintiffs Scott Peterman and Upstate Citizens for Equality, Inc., having filed a motion on February 10, 2004 for an order of summary judgment pursuant to CPLR 3212, and the defendants George Pataki, Governor of the State of New York and the State of New York having applied for and received an

extension for answering said motion, thereafter submitting their opposition papers on April 16, 2004, and the Oneida Indian Nation (hereinafter "Nation") having entered a special appearance to contest the jurisdiction of the court, and specially to renew a prior motion for dismissal of the complaint on the ground of tribal sovereign immunity, and the matter having duly come on to be heard before the undersigned Justice of the Supreme Court on April 22, 2004,

NOW, on reading and filing plaintiffs' notice of motion, supporting affirmation of Leon R. Koziol, Esq. together with exhibits A-E and memorandum of law dated February 9, 2004, the defendants' answering affidavit of Robert T. Williams sworn to on April 15, 2004 together with exhibits A-N, memorandum of law signed by Assistant Attorney General Robert A. Siegfried on April 15, 2004 together with exhibits A-C1, the Nation's notice of special appearance dated April 19, 2004, the Nation's notice of motion and memorandum of law, both dated April 19, 2004 in support of the Nation's renewed motion for dismissal, as supported by Affirmation of Peter D. Carmen, submitted on

April 19, 2004, together with Exhibits A-P and plaintiffs' response papers supported by affidavit of counsel sworn to on April 21, 2004, timely cross-motion for dismissal, all filed on May 7, 2004, and upon the Nation's supplemental memorandum of law, supported by affirmation of Peter D. Carmen, Esq. in support dismissal for lack of a justiceable controversy, submitted on May 6, 2004, and together with exhibits A-B, and response letters of plaintiffs' counsel dated May 7, 2004, and defendants' counsel dated May 17, 2004, and upon hearing from Leon R. Koziol, Esq., attorney for plaintiffs, and upon his representation that the plaintiffs have withdrawn all claims, other than the separation of powers claim, in view of the State's concession that the Saratoga Chamber of Commerce v. Pataki decision of the Court of Appeals was controlling on the separation of powers issue, and upon hearing Robert A. Siegfried, Esq., attorney for defendants and Elizabeth G. Taylor, Esq. attorney for the Nation at oral argument concluded on April 22, 2004, [and the court having rendered a letter Decision] it is hereby

ORDERED that the Oneida Nation's motion for leave to renew is hereby GRANTED, and it is further

ORDERED that the Oneida Nation's motion for dismissal of the case on grounds of Failure to Join an Indispensable Party is in all respects DENIED, and it is further

ORDERED that the Oneida Nation's Motion to Dismiss the Complaint based on lack of a Justiciable Controversy is in all respects DENIED, and it is further

ORDERED, that the Motion for Summary Judgment of plaintiffs Scott Peterman and Upstate Citizens for Equality, Inc, seeking a declaration that the 1993 Oneida Indian Nation Compact with the State of New York is invalid under New York law because it was entered into in violation of the separation of powers doctrine contained in Articles 3 through 5 of the New York State Constitution is GRANTED, and it is

DECLARED, that the 1993 Turning Stone Casino Compact between the Oneida Indian Nation and the State of New York is invalid under New York law, as it was entered into by the Governor in violation of the separation of powers

doctrine set forth in Articles 3 through 5 of the New York State Constitution.

Dated: July 28, 20004
Oswego, New York

ENTERED: _____

_____
Hon. James McCarthy
Justice of Supreme Court

25 U.S.C. § 2701

Findings:

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $ 25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities

conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was

operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act [25 USCS § 2712],

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [25 USCS § 2717(a)(1)] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation.

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and

(B) has otherwise complied with the provisions of this section[,]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [25 USCS § 2706(b)(1)-(4)];

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [25 USCS § 2710(b)(2)(C)] and shall submit to the Commission a complete resume on all employees hired and licensed by the

tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 [25 USCS § 2717] in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or

resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall

not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section

shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (♦ 64 Stat. 1135) [15 USCS § 1175] shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the

180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and

with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register

notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)].

(e) Approval of ordinances. For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)] that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Upstate Citizens for Equality
Niagara Frontier Chapter
836 Indian church Road
West Seneca, NY 14224-1235
http://www.upstate-citizens.org

May 21, 2004

Philip N. Hogan, Chairman — Fax: (202) 632-7066
National Indian Gaming Commission
1441 L Street NW
Suite 9100
Washington, DC 20005

Glenn T. Suddaby, Esq. — Fax: (315) 448-0689
United States Attorney for the Northern District of New York
445 Broadway, Room 218
Albany, NY 12207-2924

Dear Chairman Hogen and Mr. Suddaby:

I am writing to you today on behalf of the members of Upstate Citizens for Equality regarding the recent ruling of the New York Court of Appeals in the matter of Saratoga County Chamber of Commerce v. Pataki and its effects on Class III gaming in the Mohawk and Oneida casinos. In this decision the Court declared invalid the 1993 compact entered into between the Mohawks and former Governor Cuomo. Therefore any class III gaming occurring at the Mohawk casino is in violation of the IGRA.

The State of New York has recently withdrawn its appeal in our action (Peterman v. Pataki) that challenges the compact between the State of New York and the Oneida Indian Nation of New York and according to the attached letter from Assistant Attorney General Robert A. Seigfried has conceded that Governor Cuomo was without authority to enter into the 1993 Oneida Compact and it is therefore void and unenforceable under State Law. There are currently cases pending that challenges even the
Legislature's powers to authorize these compacts absent a Constitutional amendment (Dalton v. Pataki,

etc.) Therefore, there is no valid compact permitting this establishment to conduct Class III gaming under the Indian Gaming Regulatory Act (IGRA).

Therefore we are requesting that you take immediate action to order the Mohawk and Oneidas to cease and desist from conducting any Class III gaming until such time that they obtain the requisite valid tribal-state compact.

Sincerely,

Daniel T. Warren
Chair
Niagara Frontier Chapter of Upstate Citizens for Equality

Cc: Aurene M. Martin Fax (202) 208-6334
Principal Deputy Assistant Secretary
Bureau of Indian Affairs
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

OPPOSITION BRIEF

2

No. 06-470

IN THE

SUPREME COURT OF THE UNITED STATES

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

v.

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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November 3, 2006 *Counsel for Respondents*

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the doctrine of Indian sovereign immunity is so extensive that it precludes a state court from deciding whether, under that state's Constitution, its Governor can unilaterally and without legislative authorization enter into a compact on behalf of the state with an Indian tribe under the Indian Gaming Regulatory Act?

STATEMENT PURSUANT TO RULE 29.6

This brief in opposition is submitted on behalf of the parties named on the cover as Respondents in this proceeding. The only corporate entity among them is Upstate Citizens for Equality, Inc., a not-for-profit corporation organized under the laws of the State of New York. Upstate Citizens for Equality, Inc. has no parents, subsidiaries or affiliated entities and has issued no stock owned by any publicly held corporation.

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COUNTERSTATEMENT OF THE CASE

The Statement of the Case recited by Petitioner, the Oneida Indian Nation (the "Oneidas"), omits several salient facts. First, contrary to what the Petition implies, the Compact at issue in this case between the Oneidas and the State of New York, purportedly approved by the Secretary of the Interior, was not an approval for the Oneidas to conduct "Class III" gaming, as defined by the Indian Gaming Regulatory Act ("IGRA"), at the Turning Stone Casino. That is where Petitioner now claims it "invested hundreds of millions of dollars in gaming, hotel and other resort facilities, and thousands of employees came to work at the Nation's casino and resort complex" (Pet. at 2). That complex is located in the Town of Verona, New York, just off Exit 33 of the New York State Thruway (Interstate 90) in Oneida County, New York. IGRA, however, requires that Class III gaming can only be conducted on "Indian land," 25 U.S.C. § 2710(d)(1). By virtue of the decision of this Court last year, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*City of Sherrill*"), Turning Stone is not "Indian land."

The Secretary of the Interior only gave the Oneidas approval to operate a Class III gaming casino on "Indian lands," as IGRA requires. *See* Letter dated June 4, 1993 from Assistant Secretary of the Interior for Indian Affairs, Thomas Thompson, to Niels Holch, Esq. (Appendix "A" at A-1). That letter noted that at the time it was written, the Oneidas were conducting gaming at the Tribe's historic 32-acre reservation in Madison County (*Id.*). That is the very same 32 acres which this Court identified last year as being all that was left of the Oneidas' original reservation lands in New York State. *City of Sherrill, supra* at 205. That 32 acres is in Madison County, not Oneida County where Turning Stone is situated. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 160 (2d Cir. 2003). *See also U.S. v. Boylan*, 265 F. 165 (2d Cir. 1920).

In that letter, the Interior Department warned the Oneidas that while it was aware of the Oneidas' intention to build a "major new facility" at a different site (*infra* at A-2), it took no position with regard to whether this new facility was on "Indian land" as that term is used in *IGRA* (*Id.*). Despite the warning, the Oneidas nevertheless went ahead and moved the site of its Class III gambling operation from its 32 acre reservation in Madison County to the new Turning Stone location in Oneida County without any federal approvals. Now they claim that that is a proper venue for gaming and that were they forced to cease and desist, that would upset "settled expectations." That new site, however, is not "Indian land" within the meaning of IGRA, 25 U.S.C. § 2703(4). That provision defines Indian land as land "within the limits of an Indian reservation," or "held in trust by the United States" pursuant to 25 U.S.C. § 465, or held in "restricted fee" status. *See* 25 U.S.C. § 177.

Last year, in *City of Sherrill, supra*, this Court made it abundantly clear that even though the Oneidas may have reacquired fee simple title to land that was once part of its historic reservation (as is the case with the Turning Stone site), it did not, by virtue of such reacquisition, also reacquire sovereignty "in whole or in part" over such land. *Id.* at 202-203. Turning Stone is, therefore, on land subject to the laws of the State of New York, whose Constitution unequivocally prohibits commercialized gambling on non-Indian land. N.Y. Const. Art. I, § 9 (Appendix "B", *infra* at A-4). *See also Dalton v. Pataki*, 5 N.Y.2d 243, 261 n 5 (2005), *cert denied*, 126 S.Ct. 742 (2005). *See also* 25 U.S.C. § 232.

This Court's ruling in *City of Sherrill* was handed down on March 29, 2005. The Oneidas, fully appreciating the ominous implications of that decision in terms of the legality of its continuing operations at Turning Stone, immediately rushed to get that land taken into trust, submitting an application to the Bureau of Indian Affairs on April 5, 2005, exactly one week after *City of Sherrill* was handed down.

That application is still pending, but is actively opposed by New York's Governor, whose counsel, by letter dated May 13, 2005 (Appendix "C", *infra* at A-11), advised the Secretary of the Interior and the Chairman of the National Gaming Commission of his concerns regarding the legality of Turning Stone's continued operation in view of this Court's decision in *City of Sherrill*. The Governor also noted his opposition to the "land to trust" application hastily made by the Oneidas in the immediate wake of the *City of Sherrill* decision (*infra* at A-9). No Indian gaming can occur on "land to trust" territory without the consent of the Governor of the affected state. *See* 25 U.S.C. § 2719(b)(1)(A). Thus, regardless of the decision handed down by the courts below which the Oneidas are now asking this Court to review, the fact remains that Turning Stone is not situated on Indian land and thus would not be entitled to continue its operation at Turning Stone in any event. The issues the Oneidas press here are, therefore, academic.

The Petitioner's Statement of the Case also omits another salient point, which strikes at the very heart of the Tribe's argument that it would be unfairly prejudiced if its casino operation were to be deemed illegal after the Tribe had invested millions of dollars in it. It should have come as no surprise to the Oneidas when the lower courts ruled in this case that the Compact that the Oneidas entered into with New York's Governor was illegal because the Governor lacked the authority under New York's Constitution to unilaterally enter into such compact without legislative authorization. They had been warned at the time of its execution that the Compact was vulnerable to legal challenge on those very grounds. Indeed, by memorandum dated June 15, 1993 (see Appendix "D" at A-12), the Governor's counsel, Elizabeth Moore, wrote as follows:

> We have long recognized the need for legislative action to implement the compacts. The Governor has consistently taken the position that the legislature would have to authorize

> the State to implement compacts that require the State to regulate and oversee Indian gaming. That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the Legislature to negotiate and enter into compacts with any Indian tribe or nation. And, that is why, from the outset of negotiations with the St. Regis-Mohawk Tribe in 1990, and with the Nation [the Oneidas] last summer, the State's negotiators told their Indian counterparts that legislative approval would be required before the State could enter into effective compacts. (*See* Appendix "B", *infra* at A-20)

Indeed, in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), *cert denied* 540 U.S. 1017 (2003), a case very similar to the one at bar, New York's highest court cited Ms. Moore's memorandum as evidence of the Tribe's full awareness of the risks of proceeding to operate a casino in the absence of legislative authorization. *Id.* at 818, n. 8. There, the Court held that indeed New York's Governor had no power under New York's Constitution to unilaterally enter into casino gambling compacts.

Finally, the Petitioner tribe has also neglected to mention that it unsuccessfully tried to divest the New York courts of jurisdiction in this very case in another action then pending in Federal district court. In *Oneida Indian Nation v. County of Oneida*, 132 F.Supp.2d 71 (N.D.N.Y. 2000), the Court rejected the Oneidas' efforts to obtain an injunction under the All Writs Act, 28 U.S.C. § 1651, whereby the Tribe sought to enjoin the Respondents from bringing this very action in State court on the grounds that it would somehow interfere with the Tribe's land claims then pending in the Northern District of New York in *City of Sherrill, supra.* In denying that motion, the Northern District noted that the nature of the Respondents' claims in this action were not the type that

appeared to be pre-empted by IGRA. 132 F.Supp.2d at 76. Petitioners never appealed from that decision.

REASONS FOR DENYING THE WRIT

I. This Case is Virtually Identical to Another New York State Court Ruling Which this Court Has Already Declined to Review

In *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), *cert denied*, 540 U.S. 1017 (2003) ("*Saratoga*"), New York State's highest court, the New York State Court of Appeals, ruled that under New York State's Constitution, and the separation of powers and principles embodied therein, the Governor could not enter into a compact with an Indian tribe under IGRA absent legislative authorization. It held that it was that state's Constitution, not IGRA, that determines what "state actors" can bind the State to a gaming compact under IGRA (*Id.* at 822). This Court subsequently denied *certiorari*. The Oneida Indian Nation, the Petitioner here, participated as an *amicus curiae* before the New York State Court of Appeals in *Saratoga*. *Id.* at 820. The Oneidas fully briefed the very same arguments it now raises in the Petition in this case. They make virtually the same arguments in this Petition that were unsuccessfully advanced just three years ago. The result here should be no different.

II. The Threat to Indian Sovereignty Posed by the Lower Court's Decision is Far Less than the Threat to New York State Sovereignty if Its Courts were Divested of the Opportunity to Decide This Case

The Petition advances the dubious proposition that Indian sovereign immunity is so absolute that it forecloses state review of any cases that could tangentially affect Indian interests. The threat to Indian gaming posed by the prospect of a State court deciding which branch of state government has the power to enter into a compact under IGRA pales in comparison to the threat to a state's sovereignty if

its courts were to be divested of the right to decide such profound constitutional issues that concern the very core of a state's organic governing structure.

Indeed, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court noted that the question of who had the authority under State law to execute an Indian gaming compact on behalf of a state was a duty not likely to fall on one state executive officer, or even a group of officers. *Id.* at 75, n 17, *citing State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), where the Kansas Supreme Court held that the Governor of Kansas could negotiate but not enter into an Indian gaming compact under IGRA absent a grant of power from the Legislature. In so holding, the Kansas Supreme Court noted that IGRA itself was silent on what state official could negotiate on behalf of a state (*Id.* at 1179) and decided the case based on the Kansas Constitution, not IGRA (*Id.* at 80). *See also, Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997) (IGRA silent as to what state official can bind a state).

Indeed, in balancing the issues of the State interest and the Indian interest here at issue, it is overwhelmingly clear that New York's sovereignty would be seriously jeopardized if its own courts were deprived of the power to decide which, if any, branch of state government could, under its own constitution, bind that state to a compact under IGRA. Cases relied on by the Tribe to the effect that its commercial contracts with other non-governmental parties should not be adjudicated without the Tribe are not the same as cases in which the very structure of state government is implicated.

III. Even the U.S. Department of the Interior Agrees That State Courts Are the Best Fora to Decide What State Officials Are Authorized Under State Law to Enter Into Gaming Compacts Under IGRA

The U.S. Department of the Interior, the agency charged with the administration of IGRA, clearly does not agree with Petitioner's claim that state courts should have no role in deciding what branch of state government can execute an Indian gaming contract on behalf of the state under IGRA. Indeed, the Interior Department has taken precisely the opposite position. *See* letter dated September 25, 1998, addressed to Hon. Pete Wilson, Governor of California, from Kevin Gover, the Assistant Secretary of Indian Affairs within the Department of the Interior (Appendix "E", *infra* at A-21). Mr. Gover specifically addressed that very issue, stating that "clearly Congress did not intend that the Secretary [of the Interior] become the final arbiter of issues of state law" (A-22). He further wrote:

> We recognize, however, that issues concerning the scope of the Governor's authorities are matters of state law appropriate for ultimate determination by the California judiciary (A-23).

See also letter dated April 5, 1995 from Interior Secretary Bruce Babbitt addressed to Senator Jeff Bingaman (Appendix "F"), *infra* at A-29), noting that once presented with a compact under IGRA, the Secretary of the Interior has only 45 days to approve it. *See* 25 U.S.C. § 2710(d)(8)(C). Accordingly, Secretary Babbitt noted that: "We do not believe that Congress contemplated that the Department of the Interior would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority" (A-29 - A-30).

See also letter dated December 5, 1994, addressed to the Hon. John Chaffee, U.S. Senator from Rhode Island, written by John D. Leshy, Solicitor of the U.S. Department of the Interior (Appendix "G", *infra* at A-31). Mr. Leshy notes:

> Given IGRA's 45-day time constraint and the automatic approval provision, we do not believe that Congress contemplated that the Department would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority (A-32).

It is well-settled that the interpretation imparted to a statute by a Federal agency charged with its enforcement is entitled to great deference and will not be disturbed absent a totally unreasonable interpretation that runs directly counter to the statute. *Chevron USA v. National Resources Defense Council*, 467 U.S. 837, 844 (1984), *Griggs v. Duke Power Company*, 401 U.S. 424, 434-435 (1970). The Interior Department's interpretation of IGRA in this case is entirely reasonable.

IV. Divesting State Courts of Jurisdiction in These Types of Cases Would Create a Judicial Vacuum and Invite Chaos

It is not just Indian sovereignty at stake here, this case is also about the countervailing threat to state sovereignty. Petitioner argues that no state court can decide which state branch of government can enter into a gaming compact with an Indian tribe under IGRA. This aggressive assertion of Indian sovereignty is an invitation to chaos for its logical conclusion is that whenever a tribe seeks to enter into a gambling compact with the State, it can choose to negotiate with either the Legislature or the Executive Branch, depending on which is more favorably disposed to the Tribe's objectives. Then the other branch would be without any power to challenge any compact arrived at because, after all, according to Petitioner, any such decision might implicate the Tribe's vested interests in such a compact and since a

state court has no jurisdiction over a tribe, the case could not be decided because of the doctrine of indispensable parties. The absurdity of such an aggressive posture and the judicial vacuum created thereby totally exalts Indian sovereignty for the sake of gaming, while at the same time inflicting extraordinary damage on state sovereignty.

The Petitioner suggests that perhaps the Federal Administrative Procedure Act provides an alternative to state courts for resolution of such issues. Petition at 3. There would be nothing under the APA to review, however, since the Secretary is not the appropriate official to resolve such issues in the first place. *See* Appendices "E"-"G", inclusive. Nor indeed should the Secretary. It is axiomatic that federal courts do not have the power to compel state actors to comply with state law. *Doe v. Bush*, 261 F.3d 1057 (11th Cir. 2001), *cert denied sub nom, Kearney v. Does*, 534 U.S. 1104 (2002), *citing Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) ("It is difficult to think of a greater intrusion on state sovereignty than when a Federal court instructs state officials on how to conform their conduct under State law. Such a result conflicts directly with the principles of federalism that underlie the 11th Amendment"). *See also Walker v. Mintzes*, 771 F.2d 920, 933 (6th Cir. 1985) ("[A] federal court should not rule upon the validity of a state regulation challenged on the sole ground that it was not properly adopted under State law by the State Administrative agency").

Federal officials are not the only ones who believe that the resolution of this issue belongs with State court. There is substantial judicial precedent to support Respondents' argument that state courts are the proper fora to resolve what is a quintessential state law question, notwithstanding the absence of an Indian tribe as a party. Determining what branch of state government has the power to bind a state to a Tribal-State Compact is a state constitutional law issue best

decided by a state court. *See, e.g., State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), which held:

> Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the Compacts and Agreements absent legislative authorization and ratification. Such authority cannot derive from the Compact and Agreement, and must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the Agreement (emphasis supplied).

904 P.2d at 19.

See also, State ex rel. Stephan v. Finney, 251 Kan. 559 (Kan. 1992); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280 (R.I. 1995); *Catskill Development LLC v. Park Place Entertainment*, 217 F.Supp.2d 423, 442-443 (N.D.N.Y. 2002).

In sum, in adopting IGRA, Congress never intended to sacrifice state sovereignty on the altar of Indian gambling. As noted by the 10th Circuit in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997):

> While preservation of tribal sovereignty was clearly of great concern to Congress, respect for State interests relating to Class III gaming was also of great concern. We are hesitant to conclude that Congress intended to permit a State to be bound by a compact regulating Class III gaming which it never validly entered. *Id.* at 1554.

V. The Oneidas Had a Complete and Full Opportunity to Make Their Position Known in the Courts Below and They Took Full Advantage of That Opportunity Such That They Were For All Practical Purposes a Party to the Proceeding

The Oneidas contend that issues affecting their interest could not be adjudicated in their absence. The reality is that at every critical juncture of the proceedings in this case, the Oneida Indian Nation was a participant, making so-called "special appearances" even though it was not a party to the action. It is obvious that the Tribe wants to have its proverbial cake and eat it too.

There is a disingenuous aspect to the arguments that permeate its Petition. The Oneidas were named as a party below, but invoking sovereign immunity, dropped out. Then after dropping out, they sought to reappear before the Court, seeking to have the case dismissed on indispensable party grounds because they were not a party to the lawsuit.

As noted by New York's Court of Appeals in *Saratoga County Chamber of Commerce v. Pataki, supra,* Indian interests were at all times articulated both in that case by the Oneida Indian Nation as *amicus* and in the case below for the very same reasons. While the Tribe can invoke sovereign immunity to get out of the case, in so doing it takes the risk that issues may be adjudicated in its absence. While the Tribe counters that it should not have to subject itself to the jurisdiction of a state court, it simply cannot ignore the compelling countervailing interest that a state court has in adjudicating the issue of what branch of state government has the constitutional authority to bind that state under IGRA.

It is simply unacceptable that Indian tribes are totally free to negotiate with whatever state officials or branch of

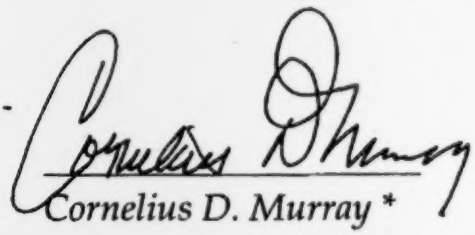
government they so choose, and then deprive a state court of the power to decide whether those officials or branch indeed have the constitutional authority to act. As previously stated, this is an invitation to chaos. The fact of the matter is that indispensable party jurisprudence is one that involves the exercise of discretion and the weighing of countervailing interests, which the courts below properly considered.

Indian gambling simply is not as important in the long run as the ability of state courts to determine what state officials can act on behalf of that state. Once that is decided, then Indian tribes can assert with more equity and conviction that they had a right to rely on the apparent or actual authority of state officials. Here that was not the case, as the Governor's counsel had warned them that the Compact they had entered into was vulnerable absent subsequent legislative authorization which never materialized (Appendix "D", *infra*). The Tribe decided nevertheless to take the risk to proceed. Now it must accept the consequences of that ill-advised gamble. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549; *cert denied* 522 U.S. 807 (1997) (Indian tribe must bear responsibility for its own precipitous conduct in engaging in gaming before it was determined whether it was legal).

CONCLUSION

For all the reasons heretofore set forth, the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,



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APPENDIX

APPENDIX "A"

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240

June 4, 1993

Mr. Niels C. Holch, Esq.
McGuiness & Holch
400 North Capitol Street NW
Hall of States Building, Suite 585
Washington DC 20001

Dear Mr. Holch:

On April 21, 1993 we received from you the compact between the Oneida Indian Nation of New York (Nation) and the State of New York (State), dated April 16, 1993.

We have reviewed the Compact and conclude that it does not violate the Indian Gaming Regulatory Act (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when notice of our approval, pursuant to Section 11(d0(3)(B) of IGRA (25 U.S.C. § 2710(d)(3)(B)), is published in the FEDERAL REGISTER.

The Compact authorizes gaming on Nation lands in general terms that paraphrase the IGRA definition of "Indian lands." These lands include the Nation's recognized 32 acre tract in Madison County near the City of Oneida where gaming is currently being conducted. The Compact does not

specifically refer to the site where we understand the Nation has built a major new facility in anticipation of being able to conduct gaming in the future. Since the Compact tracks the "Indian lands" definition of IGRA, we need not decide and take no position with regard to whether this new facility is on "Indian land" as that term is used in IGRA.

Notwithstanding our approval of the Compact, be advised that Section 11(d)(1) of the IGRA (25 U.S.C. § 2710(d)(1)) requires that gaming cannot be conducted without a tribal gaming ordinance approved by the Chairman of the National Indian Gaming Commission (NIGC). On July 8, 1992, the NIGC published in the Federal Register proposed regulations to govern approval of Class II and Class III gaming ordinances.

The final regulations were published in the FEDERAL REGISTER on January 22, 1993 (58 Fed. Reg. 5802), and became effective on February 2, 1993. Under the statute and regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman.

In addition, if the Nation intends to enter into a management contract for the operation and management of the Nation's gaming facility, such contract must be submitted to and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA (25 U.S.C. § 2710(d)(9)) and the NIGC's regulations. The Nation may want to contact the NIGC at (202) 632-7003 for further information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Nation and the State success in this economic venture.

Sincerely,

Thomas Thompson
Acting Assistant Secretary -
Indian Affairs

Enclosures

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APPENDIX "B"

N.Y. CONSTITUTION, ARTICLE I, SECTION 9

1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid of support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state: and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following

restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighters and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section.

APPENDIX "C"

STATE OF NEW YORK
EXECUTIVE CHAMBERS
ALBANY 12224

May 13, 2005

VIA FAX AND REGULAR MAIL

Gale A. Norton
Secretary of the Interior
U.S. Department of Interior
1649 C Street NW
Washington DC 20240

Philip N. Hogen
Chairman
National Indian Gaming Commission
1441 L Street NW
Suite 9100
Washington DC 20005

Dear Secretary Norton and Chairman Hogen:

As a result of the good-faith efforts of the Governor and other interested parties, settlement agreements were executed with the Akwesasne Mohawks, Cayuga Indian Nation of New York ("Cayuga Nation"), Oneida Tribe of Indians of Wisconsin, Seneca-Cayuga Tribe of Oklahoma, and Stockbridge-Munsee Community, subject to the approval of the New York State Legislature and Congress. However, as a result of the recent decision of the Supreme Court of the United States in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. ____, 125 S.Ct. 1479 (2005), it has become clear

that certain provisions of the Oneida and Cayuga settlement agreements cannot be supported by the affected local governments and the State Legislature, and therefore it is necessary to engage in further discussions regarding such provisions. Nonetheless, the Governor believes that, through our collective efforts, a fair and just settlement of the long-standing New York Indian land claims remains within our reach.

In *Sherrill*, the Court held that the Oneida Indian Nation of New York ("Oneida Nation") is prohibited from unilaterally asserting governmental jurisdiction over lands that it has acquired within the Oneida land claim area. "The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current title holders." 125 S.Ct at 1483. Although the specific issue before the Court was the taxability of land held by the Oneida Nation, in reaching its decision the Court made clear that its reasoning applied generally to state regulatory taw. Thus, the Court expressed concern that if the Oneida Nation "may unilaterally reassert sovereign control and remove these parcels from the local tax Tolls, little would prevent the tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." 125 S.Ct. at 1493.

Sherrill held that lands acquired by the Oneida Nation in the open market are subject to taxation. Additionally, *Sherrill* strongly supports the authority of State and local governments to enforce state and local laws and regulations on lands hold by the Oneida Nation and Cayuga Nation, including, without limitation, the New York Environmental Conservation Law, Agriculture and Markets Law, Public Service law, Racing and Wagering Law, Public Health Law, Tax Law, Labor Law, Penal Law, Vehicle and Traffic Law and local zoning, building and fire code laws. These State and local laws and regulations serve to protect the public health, safety and welfare for all New Yorkers.

We note in particular the Oneida Nation's conduct of gaining at the Turning Stone Casino ("Turning Stone"). *Sherrill* makes clear that the Oneida Nation does not possess governmental jurisdiction over the lands where Turning Stone is located. Assuming that such lands do not constitute "Indian lands" within the meaning of the Indian Gaining Regulatory Act ("IGRA"), see 25 U-S.C. § 2703(4), the gaming activity on such lands fails to meet the requirements of IGRA and is unlawful as a matter of Federal law. See 25 U.S.C. §§ 2710(b)(1) and 2710(d)(1) (permitting gaming only on Indian lands and requiring Class II and III gaming to be conducted pursuant to a tribal ordinance or resolution adopted by the governing body of the tribe having jurisdiction over such lands). Under these circumstances, the illegal nature of such gaming is aggravated by the independent fact that the 1993 gaming compact executed by the Oneida Nation and then Governor Cuomo was invalidated in *Upstate Citizens for Equality v. Pataki*, (Sup Ct., Oneida Co., Index No. 99-533, July 28, 2004, appeal pending), based on the decision of New York's highest court in *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801 (2003). Generally, Class III gaming that is not within the scope of IGRA also violates State law.

Recently, representatives of the Bureau of Indian Affairs ("BIA") have suggested that the lands of the Oneida Nation may be considered held subject to the federal restriction against alienation (25 U.S.C. § 177) and, therefore, fall under the jurisdiction of the Secretary of the Interior pursuant to 25 C.F.R. § 1.4. Such an implausible result is not supported by the regulation or relevant authority and appears to be in direct conflict with, and to eviscerate the import of, the Supreme Court's decision in *Sherrill*. If the BIA ultimately adopts this position, it would call into question whether, and to what extent, state and local officials may regulate the lands of the Oneida Nation. Therefore, it is imperative that the BIA clarify its position regarding the post-*Sherrill* applicability of State and local law and regulation to the lands of the Oneida Nation.

The need for immediate clarification is obvious due to the serious nature of the regulatory activities that State and local governmental officials perform to protect public health and safely immediate clarification is also necessary concerning whether it is the position of the federal government that it – and not the State – is responsible for ensuring that activities at Turning Stone are conducted in accordance with federal and stale law. If the United States intends to assert exclusive criminal jurisdiction under 18 U.S.C. § 1166 over gaming activities at Turning Stone, State and local governmental officials must be advised o£ what steps it intends to take in light of *Sherrill*.

Furthermore, the recent fee-to-trust applications submitted to the BIA by the Oneida Nation and Cayuga Nation are not an acceptable solution to the present situation. The fee-to-trust process should not be used as an "end-run" around the concerns expressed by the Supreme Court in *Sherrill*. We are particularly concerned that federal authorization for a "checkerboard" of jurisdictions -- precisely the harm that animated the Court's decision in Sherrill -- would adversely affect the State, local governments, neighboring landowners and taxpayers, Instead, we believe that the parties should work cooperatively toward addressing the status of those lands as part of a comprehensive settlement of the land claims. Unfortunately, the Oneida Nation in particular continues to pursue a unilateral strategy, disregarding the legitimate interests of the other affected parties. (Please be advised that this letter is not intended to constitute the state's formal comments regarding the Oneida Nation's recent fee-to-trust application, and the State intends to submit such comments in the future).

The Governor remains committed to a negotiated solution that avoids costly and disruptive litigation, but the status qua is untenable and the time for negotiation is short. The settlement agreements will require state and federal implementing legislation, and the State Legislature is scheduled

conclude its annual session on or about June 23rd. Recognizing that time is of the essence, the State, Oneida and Madison Counties, Oneida Tribe of Indians of Wisconsin and Stockbridge-Munsee Community have each committed to working together to resolve those matters in a fair, reasonable and expeditious manner.

To facilitate the settlement process, the State respectfully requests the BIA to urge the Oneida Nation to abandon its unilateral strategy and join the other parties in working toward a comprehensive settlement. Further, the BIA should immediately clarify its position regarding the application of state and local regulatory controls to protect all landowners in the area. Finally, with respect to the continued operation of gaming facilities on lands held by the Oneida Nation and Cayuga Nation, we respectfully request to be advised of whether the United States intends to take action and the nature of such action.

Thank you for your cooperation in this matter.

Sincerely,

Richard Platkin

Counsel to the Governor

Glenn Suddaby, United States Attorney, Northern District of NY
Michael Olsen, Acting Principal Assistant Secretary for Indian Affairs
David Morati, Office of the Solicitor
Senator Charles Schumer
Senator Hillary Rodham Clinton
Congressman Sherwood Boehlert
Congressman John McHugh
Eliot Spitzer, New York State Attorney General

Senator Raymond Meier
Senator David J. Valesky
Assemblyman William Magee
Assemblyman David R. Townsend, Jr.
Assemblywoman RoAnn M. Destito
Rocco DiVeronica, Chairman, Madison County Board of Supervisors
Joseph Griffo, Oneida County Executive
Michael Hoblock, Chairman, NYS Racing and Wagering Board
Wayne Bennett, Superintendent of State Police
Niels Holeh, Esq.

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APPENDIX "D"

STATE OF NEW YORK
EXECUTIVE CHAMBERS
MEMORANDUM

June 15, 1993

TO: The Governor

FROM: Elizabeth D. Moore

SUBJECT: Indian Gaming Legislation

You have asked us to amplify our reasons for seeking enactment of legislation to authorized the State to carry out the regulatory and oversight duties assigned to it by compacts between the State and Indian tribes or nations pursuant to the federal Indian Gaming Regulatory Act (IGRA), and to make the necessary appropriations.

Three state agencies -- the Racing and Wagering Board, the Division of State Police and the Division of Criminal Justice Services -- are assigned specific regulatory and supervisory duties by the compacts. In order for those agencies to carry out those duties and to adopt the necessary rules and regulations, new laws must be enacted and existing laws amended, which only the legislature may do.

Some suggest that since the Governor has the legal authority under IGRA and state law to negotiate and sign an Indian Gaming Compact on the State's behalf, nothing more is required. The crucial question, however, is a more practical one: Can the State's authority to regulate Indian gaming in the manner set forth in the compacts withstand a legal

challenge unless the legislature clearly authorizes the State to do so? The answer, in our view, is no.

Last week, the Secretary of the Interior approved a Compact between the Oneida Indian Nation of New York (the "Nation") and the State; the Nation hopes to begin casino gaming operations as early as next month. If the legislature fails or refuses to enact the legislation we have proposed, there would be a substantial risk that the State's efforts to regulate Indian gaming would be challenged by those who oppose Indian gaming, which could lead to wholly unregulated gaming. Unregulated gaming would clearly be inimical to the best interests not only of the State, but of the Indian tribes conducting the gaming. It is thus imperative that the legislature this session enact the legislation that we have proposed.

A. The Legislature Must Authorize the Racing and Wagering Board to Regulate Indian Games.

The compacts assign largely to one existing State agency -- the Racing and Wagering Board -- the State's "regulatory and oversight" power. The Board would (1) have access to all gaming facilities and business and accounting records; (2) receive daily inspection reports and patron complaints; (3) certify the Nation's gaming employees; (4) register all enterprises that will provide gaming services, supplies and equipment to the Nation; (5) meet four times a year with the Nation to discuss the regulatory enforcement program; and (6) decide whether to allow new games or activities not included *[sic]* a compact. In order to carry out its new duties, the Board must adopt new rules and regulations.

Only the legislature, however, can direct the Board to undertake the new Indian gaming regulatory duties required by the compacts. Equine Practitioners Ass'n, Inc. v. New York State Racing and Wagering Board, 105A.D. 2d 215, 219 (1984), aff'd as modified on other grounds, 66 N.Y.2d 786 (1985) ("an administrative agency, as a creature

of the legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.") And, only the legislature can empower the Board to adopt the new rules and regulations that will be required in order for the Board to supervise Indian gaming. See, Beer Garden, Inc. v. New York State Liquor Authority, 79 N.Y. 2d 266, 276 (1992) (a State agency's rule-making authority must be granted to it by the Legislature).

Nothing in existing law confers on the Board -- expressly or by necessary implication -- the authority to supervise Indian gaming, including the authority to adopt new rules and regulations to be required.

The legislature created the Board and gave it a specific task -- to regulate horse racing and pari-mutuel betting activities in the State. Rac. Pari-Mut. Wag & Breed Law §101. The Board was specifically empowered to adopt rules and regulations for the effective control of horse racing. Matter of Bokman v. New York State Racing and Wagering Board, 77 A.D.2d 459, 461 (1980).

When the Constitution was amended, first to allow certain bingo games, then to allow certain games of chance, the legislature expressly conferred on the Board additional specific authority to supervise that gaming. The legislature directed the Board to administer the State's Bingo Control Law, which authorizes bingo games conducted by charitable, religious and not-for-profit organizations, Exec. Law §§ 432, 435, and the Games of Chance Licensing Law, which authorizes certain games of chance conducted by charitable, religious and not-for-profit organizations. Gen. Mun. Law (citations illegible). Pursuant to both of those statutes, the Board was given narrow rule-making power to adopt rules and regulations governing the issuance of licenses under the Bingo Control Law and the Games of Chance Licensing Law, and the conducting of games under such licenses. Exec. Law

(citations illegible), Gen. Mun. Law (citations illegible), Gen. Mun. Law (citations illegible).

The Indian gaming compacts add to the Board's existing regulatory tasks an entirely new one -- the regulation of Indian gaming -- that will require new rules and regulations, personnel, policies and procedures. The compacts essentially are agreements between the State and the Indian tribe or nation about, among other things, the extent and nature of the State's regulatory and oversight power over Indian gaming. Neither IGRA nor any compact negotiated pursuant it, however, pre-empts or affects the respective duties and powers of the State's executive and legislative branches. Accordingly, the Board cannot fulfill its obligations under the compacts unless the legislature expressly confers on it the authority to do so.

Some, including the Nation, contend that the State's public policy, as expressed in the Constitution, statutes and regulations, is to authorize and regulate gaming. They assert that the legislature has already delegated broad authority to the Board (and to the Division of the Lottery) to regulate gaming and lotteries, but no further delegation is needed to empower the Board to regulate Indian gaming. That contention is without merit.

As noted above, the Board's authority to regulate gaming derives from several quite specific statutory provisions. The legislature has authorized the Board to regulate horse racing as well as bingo and limited casino gaming conducted by charitable, religious and not-for-profit groups. It does not follow from those specific, limited grants of regulatory authority that the legislature has authorized the Board to regulate all other forms of gaming, as well, in particular high-stakes gaming on Indian reservations. Nothing in those statutes expressly confers on the Board the authority to regulate and supervise high-stakes casino gaming conducted on Indian lands by Indian nations and tribes. Nor is it

possible to derive such authority from those statutes by "necessary implication.

The legislature often has enacted legislation similar to the legislation we have proposed, which authorizes State agencies to undertake activities to implement compacts that the State has entered into with other states. Three examples will suffice, though more could be listed.

- After the State entered into the Tri-State Compact with New Jersey and Connecticut, the legislature authorized state agencies "having to do with the waters of the state" to cooperate with and furnish information to the Interstate Sanitation Commission, which was created by the compact; gave the state's courts jurisdiction over enforcement proceedings brought by the Commissioner; and authorized the Comptroller to examine the Commission's accounts and books. Envtl. Conserv. Law (citations illegible).

- After the State entered into the Ohio River Valley Water Sanitation Compact with several states, the legislature authorized all State officers to "do all things falling within their respective provinces and jurisdictions necessary or incidental to the carrying out" of the Compact. Envtl. Conserv. Law (citations illegible).

- The legislature has authorized the Department of Environmental Conservation to cooperate with the Palisades Interstate Park Commission "by the joint employment of wardens, foresters and keepers for the mutual protection of the lands under their respective jurisdictions . . . ." Envtl. Conserv. Law (citations illegible).

In each of these instances, in order to implement a compact, the legislature felt it necessary to authorize State agencies to do what they already had the power to do under existing State law. Surely the legislature must authorize the Board to undertake entirely new duties that go well beyond

its existing duty to supervise horse racing and bingo and certain games of chance conducted by charities.

Accordingly, the Governor's program bill amends §188-a of the General Municipal Law expressly to confer on the Board the authority to carry out all responsibilities assigned to it under a compact, including the adoption of all necessary rules and regulations.

B. <u>The Legislature Must Authorize Background Investigations of Casino Employees and Contractors.</u>

The Compact adds also to the responsibilities of the Division of Criminal Justice Services (DCJS) and the State Police. It provides that, at the Board's request, DCJS will conduct fingerprint-based searches of the State criminal history record files maintained by DCJS, and the State Police will conduct background investigations of all of the Nations respective gaming employees, providers of gaming services, supplies and equipment, and anyone else whose background the Nation wants reviewed.

DCJS' authority with respect to the access and dissemination of the criminal history record information it maintains, as well as the purposes and conditions under which such information may be disseminated, is governed by (citations illegible) of the Executive Law. Specifically, (citations illegible) provides that only qualified agencies may have access to criminal history record information maintained by DCJS; the Board is <u>not</u> a qualified agency, as defined by (citations illegible). Moreover, (citations illegible) of the Executive Law allows DCJS to disseminate criminal history record information in connection with applications for employments *[sic]* of for licenses and permits, such as contemplated by the compact, only pursuant to statute or regulation.

Unless the legislature authorizes DCJS to do so, DCJS could not lawfully honor requests from the Board for fingerprint-based criminal record history checks made

pursuant to the compact. Nor could the Board disseminate to the Nation the results of fingerprint checks, as provided in (citations illegible) of the Compact.

Accordingly, the Governor's Program Bill adds new provisions to the General Municipal Law that authorizes the background and fingerprint checks required by the Compact.

C. The Kansas Decision

In the only reported decision on this question, the Kansas Supreme Court recently held that Kansas' governor lacked authority, under the Kansas Constitution's separation of powers provisions, to bind Kansas to a compact the Governor had negotiated with an Indian tribe pursuant to IGRA without an appropriate delegation of power by the legislature or legislative approval of the Compact. Kansas v. Finney, No. 67, 622 (Kan.) (1992). Noting that the Compact made the Kansas Lottery -- the State agency created by Kansas' legislature to operate a state lottery -- responsibility for "oversight" of gaming under the compact, the Court held that the compact amounted to an enactment of new law or the amendment of existing law and thus required legislative approval. The Court also held that the Kansas Lottery lacked authority to promulgate the new rules and regulations that would be required; the legislature had authorized it only to adopt rules and regulations governing the establishment and operation of the state lottery, not to monitor Indian gaming.

Kansas v. Feeney held that the Governor as a matter of constitutional law lacked authority even to sign a compact that could not be implemented without legislative approval. Here, of course, the Governor has signed a compact. But the decision illustrates how vulnerable the State's ability to regulate gaming under compacts would be should the Legislature fail or refuse to enact necessary implementing legislation. Just as the Kansas Compact did, the compacts

here require existing State agencies to undertake entirely new regulatory duties. A New York court faced with the claim that the State lawfully cannot perform those regulatory duties without legislative approval might very well reach the same result. As we have already noted, that would mean unregulated Indian gaming.

We have long recognized the need for legislative action to implement the compacts. The Governor has consistently taken the position that the legislature would have to authorize the State to implement compacts that require the State to regulate and oversee Indian gaming. That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the legislature to negotiate and enter into compacts with any Indian tribe or nation. And, that is why, from the outset of negotiations with the St. Regis-Mohawk Tribe in 1990, and with the Nation last summer, the State's negotiators told their Indian counterparts that legislative approval would be required before the State could enter into effective compacts.

Conclusion

The State cannot fulfill its regulatory responsibilities under the compacts without clear legislative authorization for the State agencies that must implement them. Absent such authorization, there is a substantial likelihood that the State's regulatory authority would be challenged. A successful challenge could result in wholly unregulated Indian gaming - at the very least it would create an awkward conflict between the State and the Indian tribe or nation. An Indian tribe or nation could argue that the compacts permit the State to regulate and supervise Indian gaming, if the State chooses to do so, but the State's failure or inability to do so cannot prevent Indian tribes and nations from gaming.

No one can dispute that unregulated Indian gaming would be inimical to the best interests of the State as well as to interests of Indian tribes or nations who engage in such

gaming. Moreover, it would be wholly contrary to Congress' intent in enacting IGRA as well.

cc: Mary Ann Crotty

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APPENDIX "E"

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

April 25, 1998

Honorable Pete Wilson
Governor of California
Sacramento, California 95814

Dear Governor Wilson:

On March 13, 1998, we received the Tribal-State Compact between the Pala Band of Mission Indians (Tribe) and the State of California (State), dated March 6, 1998. We subsequently received several addenda jointly executed by the Tribe and the State that amend various provisions of the Compact. We have completed our review of the Compact as amended by the addenda and conclude that it does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval is published in the FEDERAL REGISTER pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

Notwithstanding our approval of the Compact, Section 11 (d)(1) of IGRA, 25 U.S.C. § 2710(d)(1), requires that tribal gaming ordinances be approved by the Chairman of the National Indian Gaming Commission (NIGC). Regulations governing approval of Class II and Class III gaming ordinances are found in 25 C.F.R. §§ 501.1-577.15 (1997). Pursuant to IGRA and the regulations, even previously existing

gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman. The Tribe may want to contact the NIGC at (202) 632-7003 for further information to determine when and how to submit the ordinance for approval by the NIGC.

In addition, if the Tribe eaters into a management contract for the operation and management of the Tribe's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of NIGC pursuant to Section 11(d)(9) of IGRA, 25 U.S.C. § 2710(d)(9) and NIGC's regulations governing management contracts. The Tribe may want to contact the NIGC for information on submitting the ordinance and the management contract for approval by NIGC.

Secretary's Approval Authority. As a preliminary matter, a question has arisen as to whether the Secretary has the authority to review and approve the Pala Compact in light of § 129 of FY 1998 Department of Interior and Related Agencies Appropriations Act, P.L. 105-83 (November 17, 1997) (Enzi amendment). The Enzi amendment prohibits the Secretary from expending funds during fiscal year 1998 to review or approve any initial tribal-state Class III gaming compact entered into on or after the enactment of the amendment, but makes the prohibition inapplicable to any compact "which has been approved by a State in accordance with State law and the Indian Gaming Regulatory Act." The legislative history of the Enzi amendment clearly indicates that the underlying purpose was to ensure that the Secretary did not "bypass" State involvement in the process of establishing terms and conditions under which a tribe can engage in Class III gaming activities. Clearly, Congress did not intend that the Secretary become the final arbiter of issues of state law. To the extent that any requirements of the Secretary exist under the Enzi amendment, the Secretary has fulfilled those requirements by not "bypassing" the State's involvement in the establishment of the terms and condi-

tions under which the Tribe will undertake its Class III gaming operations for the obvious reasons that the Compact was negotiated by representatives of the Governor and the California Attorney General on behalf of the State and signed by the Governor. Also, to the extent that the Enzi amendment might be interpreted as requiring the Secretary to snake an inquiry into state law to determine the scope of the Governor's authority, beyond applying the presumption that the Governor has such authority, or perhaps to determine whether it is "clear beyond cavil that a Governor lacks the authority to sign a compact," *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997), the Department has satisfied any such requirement since it has reviewed and considered arguments in favor of and against the existence of such authority.

After careful consideration of the issues, and mindful of the absence of controlling judicial authority addressing the narrow issue of the California Governor's authority, we do not find that the January 30, 1989 letter from Michael J. Karsten, Deputy Legislative Counsel of California to State Senator Ralph C. Dills, or the decisions of other states' courts, *e.g., State of Kansas ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280 (1995); *State of New Mexico ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), compel the conclusion that the Governor of California lacks such authority as a matter of State law. We find the more persuasive position, as offered by the Office of the Governor, to be that the Governor has the authority under the California State Constitution to execute a compact with the Tribe on behalf of the State. We find the arguments of the Governor's office to be persuasive because we do not believe that the Compact makes new law. We recognize, however, that issues concerning the scope of the Governor's authorities are matters of state law appropriate for ultimate determination by the California judiciary.

In addition to the issue of the Governor's authority, numerous tribes, tribal organizations and concerned parties have also raised a number of issues regarding certain provisions of the Compact Because of the volume and nature of the issues raised, we will discuss those issues raised most frequently.

County Participation Agreements. Article 15 of the Compact requires that the Tribe and the County Board of Supervisors negotiate and execute a County Participation Agreement (CPA) before the Tribe commences Class III gaming operations. Article 15 sets forth the minimum requirements for what must be included in the CPA It does not, however, set forth a limitation on what may be included. Under the Compact, the CPA is to become part of the Compact In order to guarantee the Secretary's role in approving amendments to compacts and protecting tribal interests, the Tribe and the State agreed to modify the Compact to comport with IGRA's requirement of Secretarial review for Compacts and Compact amendments. The Compact as revised makes the CPA subject to Secretarial review pursuant to 25 U.S.C. § 2710(d)(8) and not effective until published in the FEDERAL REGISTER. With that change, it is no longer possible that terms inconsistent with IGRA, Federal law, or the trust responsibility can be added to the Compact through the CPA.

The CPA is applicable to a "project," which term is defined in section 1.35. The definition of this term has been amended by an addendum that provides that a "project" is an activity which (a) is authorized by the Compact, or (b) is undertaken by the Tribe to "directly facilitate" activities authorized by the Compact. When reviewing the CPA pursuant to amended section 15.2.1, the Department will strictly construe the words "directly facilitate" and require that the subject matter of the CPA be directly related to the operation of gaming activities.

Safe Harbor Provision. Article 3 provides a "safe harbor" provision under which the Tribe has the option of applying to the State Gambling Control Agency (GCA) for an opinion as to whether a specified gaming activity constitutes a Class II or Class III gaming activity for purposes of the Compact. The purpose of this provision is to enable the Tribe to engage in an activity which it believes to be a Class II activity during the period the application is pending, without running the risk of later being found to have breached the Compact should GCA subsequently determine that it believes the activity to be a Class III gaming activity. In other words, a breach of the Compact can be avoided in instances where the Tribe was conducting a Class III gaming activity in the belief that it was really a Class II activity. The Tribe is not bound by the GCA's opinion and retains the right to argue that the activity is a Class II gaming activity. Moreover, as reflected in the addendum creating a new section 3.4.5, the GCA's opinion is not binding on NIGC. Accordingly, the "safe harbor" provision does not represent a usurpation of NIGC's authority to determine whether a given activity is a Class II or Class III gaming activity under IGRA.

Number of Lottery Devices the Tribe Can Operate. Section 9.4 provides that the Tribe agrees to an allocation of 199 lottery devices, which it can either operate itself or license other tribes to operate. It also provides that the Tribe agrees to operate no more than 199 of its own lottery devices and no more than 776 lottery devices licensed to the Tribe by other tubes having a compact with the State. Section 9.5 provides for both upward and downward adjustments to the Tribe's allocation under certain circumstances, and provides that on March 1, 1999, the Tribe and State will consider whether the Tube's allocation should be modified. These provisions represent agreements that are property the subject of a Tribal-State Compact, and to which the Tribe has agreed on its own behalf These provisions are not and cannot be binding on other tribes not parties to this Compact.

Licensing Restrictions. Section 9.6.2 places a temporary per-device ceiling on the amount that may be charged for a license. Sections 9.6.3 - .4 prohibit the Tribe from employing or contracting with agents who have a financial interest in a lottery device license, and from licensing, or assigning or transferring a license to, an entity other than another tribe with a compact with the State. Our understanding is that the Tribe requested these provisions to avoid the risk of a broker or agent depriving the Tribe of license revenues and to safeguard against a secondary market in lottery devices and lottery device licenses. This is a reasonable regulation and does not violate IGRA or any other Federal law.

Economic Development Zones (EDZ). Pursuant to section 9.7, which was amended by the parties to clarify the Tribe's option of accepting EDZ benefits, the Tribe and the State have agreed that the Tribe will reduce the number of machines it operates if the following occurs: (1) the State enacts legislation authorizing an EDZ which is applicable to the Tribe's Indian lands, (2) the Tribe makes a willing choice to avail itself of the benefits conferred by the EDZ knowing that it may result in a reduction of the number of machines; (3) the income generated to the Tribe, or to entities the Tribe owns or controls, from new private investments in the EDZ exceed 25 percent of the annual net income generated by the lottery devices operated at the Tribe's facility, and (4) the benefits from the private investments result in whole or in part from the EDZ. If these things happen, the total number of lottery devices the Tribe is allocated shall be reduced by a number reflecting the amount of non-gaming income generated as a result of new private investments in the EDZ. By requiring that the net income mast be generated either to the Tribe, a tribal corporation or another business entity controlled by the Tribe, the amendment makes clear that the Tribe must willingly avail itself of the benefits of the EDZ legislation. The Tube will only accrue net income if it actively invests in business or ventures that benefit in whole or in part from the EDZ legislation. The Department views the

voluntary nature of this provision as a critical factor and would not have approved of this provision if it would have been applicable without the Tribe's consent.

Section 13.6.2-Limited Waiver of Immunity from Suit. As submitted, section 13.6.2 provided in part that "If the State contends that the Tribe is not complying with a federal or state statute or regulation that the State claims applies to the Tribe, the facility, and/or the Hotel, the State shall serve a written notice on the Tribe identifying the statute or regulation and requesting the Tribe to comply ... [T]he Tribe consents to the jurisdiction of the court in connection with such a suit" To clarify the intended scope of this limited waiver, the Tribe and the State amended this provision so that it now applies only to a state "statute or regulation governing the *employment, health, or safety* of the employees associated with the Class III Gaming enterprise that the State claims applies." The amendment restricts the application of this provision to matters covered by the Compact and is therefore permissible.

Employer-Employee Relations. Article XIII of the Compact includes provisions that cover employer-employee relations for employees of the gaming facility as well as employees of a hotel the only significant purpose of which (other than to provide lodging) is to facilitate patronage of Class III gaining operations. The issues covered in Article XIII of the Compact have not been included in other tribal-state compacts. However, the application of these provisions has been limited by the addendum to section 1.18, and thus are permissible.

We note that the Compact purports to establish certain limits on the gaming operations of tribes other than the Pala Band. Obviously, the terms and conditions of this Compact are binding only on the State and the Pala Band. Representatives of the State have confirmed that other California tribes are free to assess whether the provisions of this Compact are appropriate for inclusion in their compacts with the State.

The State has an obligation under IGRA to negotiate in good faith with each tribe requesting a compact, Because circumstances vary from tribe to tribe, our approval of this Compact cannot and does not mean that the State meets its obligation of good faith by offering only identical compacts to other tubes. Based on our conversations with representatives of the State, we do not expect that the State will insist on provisions that are not reasonable in the circumstances of other tribes.

We wish the Tribe and the State success in this economic venture.

Sincerely,

Kevin Gover
Assistant Secretary -
Indian Affairs

Encl.

Identical Letter Sent to:

Honorable Robert H. Smith
Tribal Chairman
Pala Band of Mission Indians
P.O. Box 50
Pala, California 92059-0050

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APPENDIX "F"

THE SECRETARY OF THE INTERIOR
WASHINGTON

April 5, 1995

Honorable Jeff Bingaman
United States Senate
Washington DC 20510

Dear Senator Bingaman:

Thank you for your note of March 2, 1995, enclosing a letter to President Clinton from Mr. Raymond G. Sanchez, Speaker of the New Mexico House of Representatives, relating his concerns with the Tribal-State Compacts between several New Mexico Indian Tribes and Pueblos and the State of New Mexico. Mr. Sanchez requests that we be directed to reject these compacts and return them to the State for further study because Governor Johnson failed to involve the New Mexico Legislature in his decision to approve the compacts.

As you know, Congress has carefully defined the circumstances in which the Department may disapprove a compact. Specifically, a compact may be disapproved only if it violates IGRA, Federal law, or the trust obligations of the United States to Indians. The Department reviewed the compacts and found them all to be legally sufficient under IGRA. Accordingly, the Department had no choice but to approve the compacts, which it did on March 15, 1995.

We agree that compacts between Indian tribes and states are valid only if entered into by the appropriate State officials. However, given IGRA's 45-day time constraint and

the automatic approval provision, we do not believe that Congress contemplated that the Department would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority. In this regard, we must defer to the representations of Governors, as the Chief Executive Officers of their states, unless it is clear beyond cavil that a Governor lacks the authority to sign a compact.

Sincerely,

Bruce Babbitt

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APPENDIX "G"

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

December 5, 1994

The Honorable John H. Chafee
United States Senate
Washington DC 20510

Dear Senator Chafee:

Thank you for your letter of November 18, 1994, to Secretary Babbitt, urging the Secretary to reject the Tribal-State Compact between the Narragansett Indian Tribe and the State of Rhode Island (Compact).. On December 5, 1994, the Assistant Secretary - Indian Affairs, relying on the advice of this Office, approved the Compact. This letter explains our rationale for this decision.

As you know, Congress has carefully defined the circumstances in which the Secretary may disapprove compacts. Specifically, the Secretary may disapprove a compact *only if* the compact violates IGRA, Federal law or the Department's trust responsibility to Indian tribes. 25 U.S.C. 2710(d)(8)(B). We reviewed the Compact and found no such provisions. The issue you raise is whether the Governor of Rhode Island had the authority under State law to sign the Compact on behalf of the State of Rhode Island.

IGRA requires the Secretary to either approve or disapprove a compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8)(C). If the Secretary does not approve the Compact within the 45 days, the Compact is considered to

have been approved by the Secretary to the extent the compact is consistent with IGRA. *Id.* IGRA does not allow the Secretary to render conditional approvals, nor does it allow him to defer his decision pending state court determinations of whether a Governor had the authority to bind a state to a compact. *Kickapoo Tribe v. Babbitt*, 827 F.Supp. 37 (D.D.C. 1993).

Given IGRA's time constraints and automatic approval provision, we do not believe that Congress contemplated the Department would address or resolve complex issues of State law raised by an internal State challenge to a Governor's authority. Further, since IGRA was created to ensure Indian tribes the maximum opportunity to pursue gaming ventures as economic development projects on tribal lands, the Secretary's trust responsibility to the tribes supports approving gaming compacts unless they violate IGRA or other Federal law. In furtherance of this responsibility, this Department defers to the representations of Governors, as the Chief Executive Officers of their states, unless it is clear beyond cavil that a Governor lacks the authority to sign a compact.

Governor Sundlun negotiated and entered into the Compact with the Narragansett Tribe. The Governor, relying on his own Executive Counsel, has asserted and continues to assert that he had the authority under Rhode Island law to negotiate and enter into this Compact. While cases have been filed in Rhode Island state and federal courts on the question of the Governor's authority, no court has yet resolved the issue. In this case, then, we deferred to the Governor's representations that he had the authority to sign the Compact on behalf of the State of Rhode Island. Since we found no other reasons to disapprove the Compact, it was approved.

We agree that compacts between Indian tribes and states are valid only if entered into by the appropriate State officials. For example, a compact signed by the Governor of

Kansas, where the Kansas Supreme Court had already determined that the Governor lacks such authority, would be invalid. *See Kickapoo Tribe v. Babbitt, Id.; see also Kansas Ex. Rel. Stephan v. Finney,* 836 F.2d 1169 (Kan. 1992).

We believe that our decision to approve the Compact does not unduly prejudice the parties who have challenged the Governor's authority. Indeed, if we were to disapprove to Compact, we would moot out all court review of this question, which you have assured us will occur and be decided on an expedited basis.

Our approval merely sets the stage for other implementing actions contemplated by the Compact. If the Rhode Island Supreme Court were to determine that the Governor lacked the authority to sign the Compact on behalf of the State, the courts could provide whatever remedies might be available under state law. Further, we assume there must be other forums in the State which could prevent any actions taken to implement the Compact from injuring the State or its citizens pending a decision by the State Supreme Court.

We believe that IGRA and our trust responsibilities to the Tribe require approval at this time. Please contact my office if you have further questions.

Sincerely,

John D. Leshy

Solicitor

The previous letter was sent to the following people:

The Honorable Lincoln Almond
Office of the Governor Elect
State of Rhode Island and Providence Plantations

Attorney General Jeffrey B. Pine
Department of the Attorney General
72 Pine Street
Providence RI 02903

The Honorable Jack Reed
United States House of Representatives
Washington DC 20515-3902

The Honorable Claiborne Pell
United States Senate
Washington DC 20510-3901

Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

(3)

No. 06-470

IN THE

Supreme Court of the United States

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

-v-

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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November 27, 2006

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ARGUMENT

Respondents do not deny that the New York courts have adopted and applied to the Oneida Indian Nation of New York ("Oneida Nation" or "Nation") a legal rule that an important tribal right under federal law can be adjudicated in the tribe's absence, and, notwithstanding the Nation's sovereign immunity, on the ground that the tribe can always protects its interests by waiving immunity and intervening. They also do not dispute that the New York rule conflicts with this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986), and with the unanimous view of the federal courts, nor do Respondents dispute that state courts are divided on the significant issues regarding the state recognition of tribal sovereign immunity presented in this case. (see Petition, pp. 13-17). They offer no legitimate reason for this Court to deny the petition.

I. *City of Sherrill v. Oneida Indian Nation of New York* Does Not Render The Issue In This Case Moot.

Respondents complain that the Petition does not address the import of this Court's recent decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). *Sherrill* has no bearing on the question presented in this Petition: whether New York may adopt a rule that eviscerates federally protected sovereign immunity. *Sherrill* certainly does not render the issue presented here moot or "academic," Brief in Opposition ("BIO") at 3, nor does it affect this case in any way that would complicate this Court's review.

Sherrill did not extinguish the Nation's interest in the validity of its gaming compact. Contrary to Respondent's suggestion, the governor's approval is not needed before gaming will be allowed on land held in trust by the United

States for the benefit of the tribe. BIO at 3. Consent is not required for gaming on lands located within or contiguous to the boundaries of the Oneida's reservation as they existed on October 17, 1988, 25 U.S.C. § 2719 (a), as the land on which Turning Stone is situated certainly is. *Sherrill,* 544 U.S. at 216 n. 9 (leaving undisturbed the Second Circuit's ruling that the reservation was not "disestablished"). For the same reason, Turning Stone is Indian land "within the limits of [the Oneida] reservation" for purposes of federal authority under IGRA, 25 U.S.C. § 2703(4), even if the Nation cannot assert its sovereignty or tax immunity over the land. *See also* 544 U.S. at 221 (citing "on reservation" trust regulations, 25 CFR § 151.10, as applicable to Nation's land). Gaming under an approved compact is lawful on Indian land as defined by IGRA. Finally, whatever the import of *Sherrill* on the reservation land at issue in that case, it has no impact on the "historic 32-acre reservation." 544 U.S. at 207. Any impact from a determination that the Nation's compact has no legal force, however, would apply to all of the Nation's lands, including the "historic 32-acre reservation."[1]

II. The Issue Presented In This Case Is Significantly Different From That In *Saratoga County Chamber Of Commerce v. Pataki.*

The categorical rule applied to the Nation in this case is significantly different from the New York Court of Appeals' application of state indispensable party rules in *Saratoga County Chamber of Commerce v. Pataki*, 100

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[1] As support for their argument about the legality of gaming, Respondents refer the Court to a letter from the governor's counsel to federal officials date May 13, 2005. (BIO App. C). That letter is not in the record, and is not properly before the Court. It is noteworthy, however, that Respondents do not suggest that federal officials have agreed with the analysis presented in that letter, which is in conflict with the plain terms of IGRA.

N.Y.2d 801, 798 N.E. 2d 1047 (2003), which this Court declined to review, 540 U.S. 1017 (2003).

First, *Saratoga* prospectively resolved an open question of state constitutional law: whether the governor of New York needed legislative approval to execute a gaming compact with an Indian tribe under IGRA. The state Court of Appeals emphasized the importance of resolving that question to provide future guidance for state officials. 100 N.Y. 2d at 814, 820 (if review were denied, "an important constitutional issue would be effectively insulated from judicial review"). This Court (Ginsburg, J.), denied a stay in *Saratoga* on the understanding that the effect of the New York Court of Appeals' decision in that case was simply to clarify the authority of the governor under state law, not to threaten the continuing operation of the Mohawks' casino (as has proved to be the case).

The issue presented here is significantly different. Respondents' goal was not to resolve a question of state constitutional law, which already had been resolved in *Saratoga,* but to affect the rights of the Nation under a compact that had been approved by the federal government many years earlier. The denial of review in *Saratoga* says nothing about the need to review this judgment, entered in derogation of tribal sovereign immunity for no purpose other than to alter the tribe's ability to operate a casino under its federally-approved compact.

Second, the rule announced by the courts in this and other recent New York cases is not limited to the circumstances presented in *Saratoga,* where the court found a compelling need to resolve a significant state constitutional issue to provide guidance for state officials. Rather, the New York courts have announced and followed a *categorical rule* that Indian tribes are not indispensable to a suit affecting their rights because they can protect their rights by waiving

sovereign immunity and entering the litigation. That rule is a significantly greater affront to federal supremacy than the ruling in *Saratoga.*

Third, in *Saratoga*, the State vigorously defended the validity of the compact under the State constitution, on state law *laches* and standing grounds, and on the ground that state court review of the gaming compact was preempted by federal law. One could therefore argue, that in *Saratoga*, the New York Court of Appeals had the benefit of a full adversary presentation of the state and federal issues and that the Mohawk tribe's interests were adequately represented by the State.

That conclusion is impossible to reach in the present case because the State flatly refused to present a *laches* defense based on Respondents' nearly six-year delay in filing their state court challenge after the Nation's casino facility opened, a defense that was significantly stronger than the *laches* defense in *Saratoga,* where the suit was filed soon after the Mohawk casino first opened in 1999.[2] The State also

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[2] Contrary to Respondents' claim, the Nation did not "take a risk" in building Turning Stone before it was clear whether gaming was legal under the compact. BIO at 13. Before the Nation began construction of Turning Stone, the Nation's compact had been approved by the Secretary of the Interior and was therefore "in effect" under IGRA. 25 U.S.C. § 2710 (d)(1)(C). No further approval was necessary to determine that gaming was legal at Turning Stone. The memorandum from former Governor Mario Cuomo's counsel addressing the need for legislation to implement the compacts has nothing to do with "warn[ing] . . . that the Compact was vulnerable to legal challenge" on state separation of powers grounds. BIO at 3. In fact, as is clear from the face of the memorandum, BIO App. D, the concern was the need for legislation to implement certain aspects of the state's regulatory duties under the compact, not making the compact valid. The memorandum is explicit that the consequence of failing to pass implementing legislation would be "unregulated gaming," not illegal gaming. In addition, the state legislature passed the legislation to implement the compact that is discussed in the memorandum. The New York Court of Appeals misread this memorandum (written after the

refused to challenge the Respondents' standing to sue under New York's "taxpayer standing" law, which requires a fiscal nexus, even though there was no nexus whatsoever between any state expenditures and the absence of legislative approval: the legislature has annually approved the expenditure of funds to oversee the Nation's casino under the compact, and has continued to do so notwithstanding *Saratoga*.

The State's refusal to defend the compact meant that the state court did not have the benefit of an adversary presentation on the merits. The Nation's appearance was for the limited purpose of asserting its immunity as a bar to the suit. It therefore could not present the substantive arguments against Respondents' suit. Because the State abandoned its objections to Respondents' suit, there was no presentation or litigation of the substantial state and federal arguments against the declaratory judgment Respondents' sought.

Finally, the Oneida Nation's submission of an *amicus curiae* brief in *Saratoga* does not mean that the Nation has been heard on the merits of Respondents' challenge to the Nation's compact. The submission of an *amicus* brief in another party's case is not a waiver of the right to be heard in a case involving the party's own legal rights. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583-84 (6th Cir. 2003). Nor is it a waiver of sovereign immunity permitting the adjudication of a party's rights in absentia. Furthermore, the Nation was limited in *Saratoga* both by the arguments made by the parties below and by the record in that case, which, as discussed above, was significantly different from the record in this case, particularly on the strength of the *laches* defense that should have been but was not presented in this case.

Oneida compact was approved but before approval of the Mohawk compact at issue in *Saratoga*) as putting the Mohawks on notice of the invalidity of their compact.

III. It Creates No "Vacuum" For State Courts To Be Unable To Pass Judgment On A Federally Approved Gaming Compact Because Whether A Federally Approved Gaming Compact Is "In Effect" Under IGRA Is A Federal Question.

Through a state law challenge to the governor's authority to enter into a gaming compact, Respondents have attempted to vest the state court with authority to review a federally approved gaming compact. They complain that giving effect to federally protected sovereign immunity will deprive state courts of this authority.

The flaw in Respondents' argument is that they ignore the limited role states may play in the regulation of Indian gaming. The legality of Indian gaming, including whether a gaming compact satisfies IGRA, is a question of federal law. Petition at 10 n. 4. The approval of a gaming compact by the Secretary of the Interior is subject to review in federal court under the Administrative Procedure Act. When an IGRA compact is challenged on the basis of the authority of the governor under state law to enter into the compact, federal courts have the authority to resolve any predicate question of state law, *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 30-32 (1951) (interstate compact not in violation of West Virginia constitution), or to certify the question to the state's highest court. *See Narragansett Indian Tribe v. Rhode Island,* C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T, 1996 U.S. Dist. LEXIS 11472, at *4 (D.R.I. Feb. 13, 1996).

Contrary to Respondents' submission, the federal government has not taken the position that state courts must determine whether an IGRA compact was entered into in compliance with state law. Respondents ignore the

significance of the timing of a state law-based challenge to the compact. While a challenge to the governor's authority to enter a compact, brought before federal approval of the compact, implicates primarily state law issues, *see State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), federal approval of the compact means that the compact is "in effect" for purposes of IGRA and any subsequent challenges to the compact present a federal question that must be resolved in accordance with the detailed provisions of IGRA.[3] The United States briefed this issue in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997):

> Once in effect under federal law, the compacts remain in effect unless and until the Secretary's approval is withdrawn pursuant to federal law. A post-approval state high court judicial decision on a question of state law cannot by its own force render an IGRA compact no longer 'in effect' under federal law. Approval and publication by the Secretary is the critical event in the federal statutory scheme. To permit subsequent

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[3] Respondents have attached several letters from federal officials in an effort to demonstrate federal support for their position. These letters are not in the record and are not properly before the Court In addition, Respondents are mistaken both about the import of the letters and the deference accorded to them. In fact, the letters recognize that the only proper time to bring a purely state law challenge to the governor's authority to enter a compact is prior to federal approval. See BIO at A 32-33. In any event, informal letters are not entitled to *Chevron* deference from this Court. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, -- U.S. --, 126 S. Ct. 1843, 1848 (2006)(expressions of agency understanding not entitled to *Chevron* deference); *Gonzalez v. Oregon*, -- U.S. --, 126 S. Ct. 904, 914-15 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 303-04 (2001) (Customs rulings not entitled to *Chevron* deference when not issued pursuant to delegated authority to make rules carrying the force of law).

> interpretations of state law by state entities to render a compact void or undo Secretarial approval would, in effect, allow one party to the compact to exercise unilateral power over its status, and would allow the states to preempt the federal scheme and would introduce uncertainty and potential chaos into a setting in which Congress intended IGRA to furnish stability. (Brief pp. 37-38).

That analysis echoes the words of this Court in "A State cannot be its own ultimate judge in a controversy with a sister state." 341 U.S. Ct., 28. Justice Jackson's concurrence recognized that "West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation." 341 U.S. at 35.

This Court in *Dyer v. Sims* recognized that the enforceability of an interstate compact presents a federal question for federal courts to decide, even when a state's participation is challenged under the state's own constitution. The same is true of the tribal-state compact system ordained by Congress, which binds tribal and state sovereigns within a federal regulatory scheme. Respondents' effort to circumvent the detailed review set out in IGRA by bringing a state law challenge, in state court, with neither the tribe nor the federal government present as a party, is incompatible with federal law.

IV. The Nation Appropriately Entered A Limited Appearance For The Purpose Of Asserting Its Sovereign Immunity And Moving To Dismiss On The Ground That It Is An Indispensable Party.

Finally, there is nothing "disingenuous" about a sovereign asserting its sovereign immunity and entering an appearance to insist that as a consequence of its sovereign immunity, the court may not litigate its interests. BIO at 12. The Nation did not challenge the Respondents' case on the merits – because of its limited appearance, the Nation could not raise the standing and *laches* defenses the state refused to present. Rather, the Nation did exactly what the United States and other sovereigns have done in similar circumstances. The Nation entered a limited appearance for the sole purpose of asserting that it is an indispensable party whose rights cannot be adjudicated because of its sovereign immunity. *See, e.g., Lazar v. Benson,* 156 F.Supp. 259, 261-62 (E.D.S.C. 1957) (Secretary of Agriculture made special appearance and moved to dismiss on the ground that he was an indispensable party); *see also Chen v. New Jersey,* 227 B.R. 614, 624 (D.N.J. 1998) (New Jersey could have avoided waiver of sovereign immunity by entering special appearance to contest the jurisdiction of the court); *Lamont v. Travelers Ins. Co.,* 281 N.Y. 362, 24 N.E.2d 81 (1939) (Mexico appeared specially and moved for dismissal for lack of jurisdiction).

Respondents assert that "[w]hile the Tribe can invoke sovereign immunity to get out of the case, in so doing it takes the risk that issues may be adjudicated in its absence." BIO at 12. That assertion simply restates the New York rule that tribes have no sovereign immunity in state court because they can intervene, and their refusal to do so is treated as a waiver of the right not to have their interests determined in their absence. If allowed to stand, the New York rule will mean, in practice, that an Indian tribe has no sovereign immunity. Forcing a sovereign to waive its immunity and appear in order to protect its interests eliminates the immunity altogether. This Court would not sustain state legislation that eliminated tribal sovereign immunity. It should not permit state courts to reach the same result under the rubric of state indispensable party rules.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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